

Indiana Law Review

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2006 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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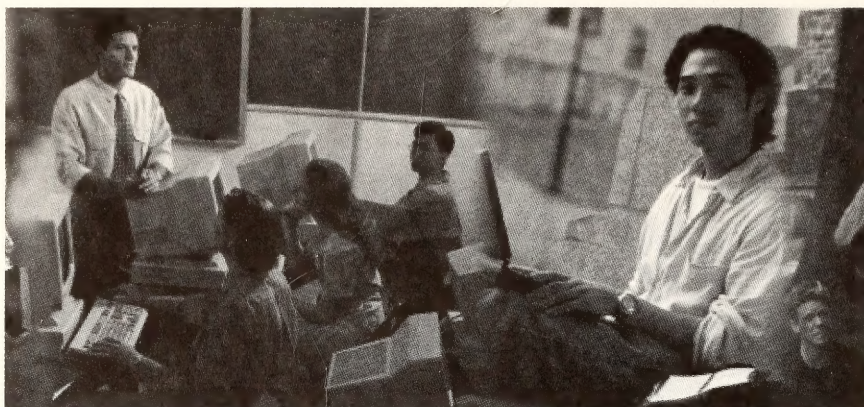
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TABLE OF CONTENTS

SURVEY

I. Introduction

- Access to Justice for People Who Do Not Speak English
Chief Justice Randall T. Shepard 643

II. Supreme Court Review

- An Examination of the Indiana Supreme Court Docket,
Dispositions, and Voting in 2006
Mark J. Crandley 659
P. Jason Stephenson
Paul Jefferson

III. Administrative Law

- Survey of Administrative Law
Jennifer Wheeler Terry 675

IV. Civil Procedure

- Recent Developments in Indiana Civil Procedure
Michael A. Dorelli 705

V. Constitutional Law

- Indiana Constitutional Developments: Incrementalism
and School Tuition
Jon Laramore 749
Jane A. Dall

VI. Criminal Law and Procedure

- Recent Developments in Indiana Criminal Law and
Procedure
Joel M. Schumm 789

VII. Employment Law

- Year in Review: A Survey of Significant 2006
Developments in the Area of Labor and Employment Law
and the Impact upon Indiana Employers
Mark J. Romaniuk 821

VIII. Evidence

- Recent Developments in Indiana Evidence Law
Jeff Papa 863

IX. Family Law		
Recent Developments: Indiana Family Law	<i>Joseph W. Ruppert</i> <i>Joni L. Sedberry</i>	891
X. Health Care Law		
Survey of Recent Developments in Health Law	<i>Ice Miller LLP</i>	931
XI. Insurance Law		
Survey of Recent Developments in Insurance Law	<i>Richard K. Shoultz</i>	963
XII. Intellectual Property Law		
Survey of Developments in Intellectual Property Law	<i>Christopher A. Brown</i>	987
XIII. Product Liability		
Survey of Recent Developments in Indiana Product Liability Law	<i>Joseph R. Alberts</i> <i>James Petersen</i>	1007
XIV. Professional Responsibility		
Survey of the Law of Professional Responsibility	<i>Charles M. Kidd</i>	1053
XV. Property Law		
Recent Developments in Indiana Real Property Law	<i>Tanya D. Marsh</i> <i>Robert G. Solloway</i>	1067
XVI. Taxation		
Recent Developments in Indiana Taxation	<i>Lawrence A. Jegen, III</i> <i>Kimberly Whyte Chowning</i> <i>Tom D. Conley</i>	1103
XVII. Tort Law		
Recent Developments in Indiana Tort Law	<i>Ann L. Thrasher Papa</i>	1175

ACCESS TO JUSTICE FOR PEOPLE WHO DO NOT SPEAK ENGLISH

CHIEF JUSTICE RANDALL T. SHEPARD*

For the first time since German faded from American public discourse in the wake of World War I, the nation finds itself engaged with substantial language issues. While the debate often focuses on problems associated with education and employment, there are also many other public institutions and services that confront equally important communication challenges. For lawyers and judges, this is a story about protecting access to justice.

As the number of non-English speaking individuals in the United States continues to rise,¹ courts struggle to ensure these individuals can maneuver the system of justice.² Encountering the judicial system is difficult enough for native English speakers. Non-English speakers struggle merely to understand the words of court staff, lawyers, and judges, let alone the corresponding processes. Without a translator, a non-English speaker is left deaf without the aid of sign language.

In certain settings, state and federal statutes, common law, and constitutions require appointment of interpreters. This is not an easy task for a trial judge, who must first identify the non-English speaker's language and dialect—a challenge considering the judge may have little or no prior experience with the language. Second, the judge must locate an interpreter and determine whether the interpreter is qualified—not only to interpret generally, but to participate actively in the special nature of judicial proceedings. Judges were traditionally left to their own devices to make these determinations on a case-by-case basis. Sometimes this worked, and sometimes it did not.

* Chief Justice of Indiana. Princeton University, A.B., 1969; Yale Law School, J.D., 1972; University of Virginia, LL.M., 1995.

1. The National Center for State Courts ("NCSC") reported that, [r]ecent [2000] census figures indicate that about 10 percent of people living in the United States are foreign born. Eighteen percent—almost 45 million people—report that they speak a language other than English at home and almost 5 percent "do not speak English well," or "do not speak English at all."

NATIONAL CENTER FOR STATE COURTS, CONSORTIUM FOR STATE COURT INTERPRETER CERTIFICATION, FREQUENTLY ASKED QUESTIONS NO. 7 (2006), http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortCertFAQ.pdf. Similarly, the NCSC reported that "[w]hile the total population of the United States increased by 10 percent between 1980 and 1990, the nation's Asian and Pacific Islander minority populations increased by 108 percent; the nation's Hispanic population increased by 53 percent; other language minority populations increased by 45 percent." NATIONAL CENTER FOR STATE COURTS, COURT INTERPRETING, PUBLICATIONS & RESOURCE MATERIAL 11 (2002), http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf [hereinafter NCSC, RESOURCE MATERIAL].

2. Franklyn P. Salimbene, *Court Interpreters: Standards of Practice and Standards for Training*, 6 CORNELL J.L. & PUB. POL'Y 645, 647 n.14 (1997) (noting state court bias reports from Florida, Georgia, Massachusetts, Minnesota, and Oregon recommended the appointment of language interpreters to protect non-English speakers' rights).

In recent years, both the federal government and individual states have undertaken to locate, train, test, and certify interpreters. These efforts gave meaning to the otherwise hollow statutory and constitutional rights of non-English speakers in the judicial system.

I. THE SOMETIME RIGHT TO AN INTERPRETER

Because individual state and federal courts have not tackled the language barrier uniformly, the “right” to an interpreter varies. As a practical matter, the need for an interpreter may not be recognized until a judge is face-to-face with a party or witness whom the judge cannot understand. Perhaps the individual speaks Spanish, American Sign Language, Vietnamese, Chinese, or Russian. In these process-halting moments, people universally recognize the need for interpreters, but what happens when an individual understands enough English to communicate with the court but only at the most basic level? Who or what controls whether an interpreter must be appointed?

A variety of statutes, common law, or constitutions may supply the answer. The federal Court Interpreters Act of 1978 governs interpreter issues in federal proceedings and requires interpreters “for the hearing impaired . . . and persons who speak only or primarily a language other than the English language.”³ As a practical matter, however, courts possess broad discretion,⁴ guided largely by common law and constitutional concerns.⁵

Indiana’s statutes take an approach similar to the federal Court Interpreters Act in delineating those situations where an interpreter must be appointed:

Every person who cannot speak or understand the English language or who because of hearing, speaking, or other impairment has difficulty in communicating with other persons, and who is a party to or a witness in

3. Court Interpreters Act of 1978, 28 U.S.C.A. § 1827 (West 2007).

4. Neither civil nor criminal procedural rules identify those situations where an interpreter must be appointed. *See* FED. R. CIV. P. 43(f) (stating “court *may* appoint an interpreter of its own selection and may fix . . . reasonable compensation”) (emphasis added); FED. R. CRIM. P. 28 (stating “court *may* select, appoint, and set the reasonable compensation for an interpreter”) (emphasis added).

5. Defendant’s Fifth Amendment, Sixth Amendment, and Due Process rights may be violated where an interpreter is improperly denied or an interpretation is inadequate. *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) (stating defendant’s Fifth Amendment right violated where interpreter withdrawn despite defendant’s refusal to testify without an interpreter, claiming he still needed one, where no evidence proved otherwise); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986) (“[S]everal circuits have held that a defendant whose fluency in English is so impaired that it interferes with his right to confrontation or his capacity, as a witness, to understand or respond to questions has a constitutional right to an interpreter.”) (citing cases from the First, Second, and Fifth Circuits); *United States v. New York*, 434 F.2d 386, 388 (2d Cir. 1970) (finding defendant’s due process and confrontation rights violated where translator merely summarized English-speaking witness’ testimony for Spanish-speaking defendant twice during four-day trial leaving defendant to hear nothing more than “a babble of voices”).

a civil proceeding is entitled to an interpreter to assist the person throughout the proceeding.⁶

Equivalent entitlement is generally afforded in criminal proceedings, and the statutory right to an interpreter is buttressed by the Indiana Constitution and by common law.⁷

Until quite recently, this right to an interpreter existed without any statement of minimum qualifications or any plan to train, test, or certify interpreters. This left trial judges on the front lines with little guidance. Where should the judge find the interpreter? What minimum qualifications should the interpreter possess? How should the judge test the interpreter's performance? Who can properly serve as an interpreter while maintaining the integrity of the court (family member of party, court personnel, juror, police officer, prison inmate)? What should the judge do if an interpreter cannot be located? And how should the judge ensure that the interpretation is accurate if the interpretation is not somehow recorded?

All of these questions initially went unanswered and related problems went unnoticed. As the number of non-English speaking individuals in the United States increased, however, interpreter problems in courts grew as well.

II. MANY REASONS INTERPRETATION CAN GO BADLY

When an interpreter is engaged to translate testimony, the court reporter typically only records the English translation, and the original words of the non-English speaker are forever lost. This phenomenon makes it difficult to identify interpreter problems, and even if the problem is identified, it may be impossible to challenge the interpretation on appeal.⁸ Malfunctions of interpretation largely fall into three categories: (1) the interpreter speaks a different language or dialect than the non-English speaking party or witness; (2) the interpreter is biased; or (3) the interpreter inaccurately translates the testimony.

A. *Interpreter Speaks Different Language or Dialect*

It is difficult even for someone familiar with a given language to distinguish

6. IND. CODE § 34-45-1-3 (2004) (entitlement to interpreter in civil proceeding); *see also id.* § 4-21.5-3-16 (entitlement to interpreter in administrative proceeding). In addition, where no procedure is outlined in Indiana's criminal procedure statutes, the court may proceed "consistent with applicable statutes or court rules." *Id.* § 35-35-2-2. As a result, because Indiana's criminal procedure statutes do not delineate interpreter requirements, courts may apply the civil or administrative requirements.

7. *See* IND. CONST. art. 1, § 13 (rights of accused in criminal prosecutions); *Chavez v. State*, 534 N.E.2d 731, 735-38 (Ind. 1989) ("The interpreter is necessary to implement fundamental notions of due process such as the right to be present at trial, the right to confront one's accusers, and the right to counsel.").

8. NCSC recommends making an audiotape of interpreted testimony to preserve the original words. NCSC, RESOURCE MATERIAL, *supra* note 1, at 134-36.

the language's many dialects, and even more difficult for judges to distinguish between dialects or recognize the need for a different translation. Moreover, a shortage of qualified interpreters can lead judges, lawyers, and parties to accept the varied interpretation as "close enough." In *State v. Lopes*, for example, the defendant spoke Portuguese, and the judge and lead counsel agreed that defendant's co-counsel who was fluent in Spanish, not Portuguese, could translate after concluding "that defendant had sufficient fluency in Spanish to at least be apprized [sic] of the gist of the hearing."⁹

In another instance reported by the National Center for State Courts, "[a] defendant was convicted and served years of a lengthy prison term [before his sentence was ultimately commuted] following a trial when the court interpreter spoke a *different language* than that of the defendant (interpreter spoke Spanish while the defendant's language was Mixtec)."¹⁰

Similarly, in *Ememe v. Ashcroft*, an immigration judge found Ememe's testimony not credible because Ememe's responses were short and lacking detail during an interview about credible fear, and then much more verbose when Ememe later appeared in person before the immigration judge.¹¹ Ememe testified before the immigration judge, however, in her native language, Amharic, but had testified at the credible fear interview in Italian.¹² The Seventh Circuit reversed the credibility finding after concluding that the immigration judge failed to assess Ememe's Italian language proficiency and noting that the variance in testimony could be the simple result of Ememe's increased ability to express herself in her native language.¹³

B. Interpreter Is Biased

The shortage of qualified interpreters also necessitates that judges use whatever resources may be available. Documented instances reflect use of "bailiffs, secretaries, building janitors, courthouse personnel, jurors, arresting officers, probation officers, prison guards, civil plaintiffs, district attorneys and other counsel, prosecution witnesses, young children, friends and relatives of victims or witnesses, prison inmates, [] defendants and co-defendants."¹⁴

9. *State v. Lopes*, 805 So. 2d 124, 125 (La. 2001) (emphasis added).

10. NCSC, RESOURCE MATERIAL, *supra* note 1, at 12.

11. *Ememe v. Ashcroft*, 358 F.3d 446, 450, 452 (7th Cir. 2004).

12. *Id.* at 452.

13. *Id.*

14. Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. TOL. L. REV. 593, 603-04 (1999) (citing reports from New Jersey, New York, the Second Circuit and Third Circuit); *see also* Salimbene, *supra* note 2, at 658 (citing *Commonwealth v. Delrio*, 497 N.E.2d 1097 (Mass. App. Ct. 1986) (conviction reversed where one defendant was allowed to interpret his co-defendant's pre-Miranda admission)); NCSC, RESOURCE MATERIAL, *supra* note 1, at 13 (quoting Ken Kolker, GRAND RAPIDS PRESS, Feb. 21, 1993) ("[Jail inmate] Christopher Sanchez, who speaks Spanish, interpreted for the courts and the jail more than 20 times during his six months jail term . . . Once he even translated for a Laotian robbery suspect, just a

At least a few of the individuals in these categories might have predilections that foster misinterpretation. In addition, judges making these case-by-case interpreter appointments are likely left without any way to evaluate whether the translation is accurate. These problems can easily compound and threaten the integrity of the judicial process.

C. Inaccurate Translation

The combination of a shortage of qualified interpreters, a lack of means to test and certify interpreters, translation in the wrong dialect or language, and biased interpreters creates the predictable result. Sadly, an inaccurate translation can end a person's liberty or defeat an otherwise meritorious claim.

Four examples are instructive. One particularly disturbing example involved a deaf woman who was raped.¹⁵ The interpreter misinterpreted the victim's testimony by telling the court that the victim said "made love" instead of "forced intercourse" and "short blouse" instead of "blouse."¹⁶ Even simple mistakes of this scale can easily end a valid rape claim.¹⁷

Similarly, a plaintiff's worker compensation claim ended due in large part to a misinterpretation.¹⁸ When questioned by the judge, a Mexican-dialect employee testified that only his lower back was injured.¹⁹ The interpreter, however, interpreted "cintura" as "waist" rather than "lower back," and the judge found the employee's "statements to be inconsistent and evasive."²⁰

Yet another likely interpretation error resulted in a Cuban man's temporary loss of liberty.²¹ The Cuban defendant was convicted on drug chargers for uttering the words, "¡Hombre, ni tengo diez kilos!"²² The defendant used these words in response to a request for a loan, and the words can be properly

month after Sanchez says he picked up some of that language from a fellow inmate.").

15. SY DUBOW, *LEGAL RIGHTS: THE GUIDE FOR DEAF AND HARD OF HEARING PEOPLE* 182 (1992) (citing the unreported decision of *Commonwealth v. Edmonds*, Cir. Ct. Staunton, Va. (1975)).

16. *Id.*

17. Mr. Dubow noted that "[t]he legal effect of the interpreter's mistake [in *Edmonds*] was devastating because, in rape, force is the essential element." *Id.*

18. Debra L. Hovland, *Errors in Interpretation: Why Plain Error Is Not Plain*, 11 *LAW & INEQ.* 473, 473 (1993) (citing the State of Washington's Court Interpreter Task Force Initial Report and Recommendations published in 1986).

19. *Id.*

20. *Id.*

21. Michael B. Shulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 *VAND. L. REV.* 175, 176 (1993) (citations omitted).

22. Quote taken from wire tape of telephone conversation, thereby preserving the defendant's original words for later review. *Id.* at 176 n.1 (citing Alain L. Sanders, *Libertad and Justicia for All*, *TIME*, May 29, 1989, at 65).

translated as “man, I don’t even have ten cents.”²³ The interpreter, however, mistakenly translated the words as “man, I don’t even have ten kilos.”²⁴ Fortunately for this defendant, this translation error was caught and the conviction overturned, but these errors often go unnoticed and unpreserved.²⁵

Finally, an accurate interpretation requires that the interpreter translate everything that is said, even “apparent misstatements.”²⁶ The following example from the mental health setting illustrates the related dangers of an incomplete interpretation:

Clinician to Spanish-speaking patient: “What about worries, do you have many worries?”

Interpreter to patient: “Is there anything that bothers you?”

Patient’s response: “I know, I know that God is with me, I’m not afraid, they cannot get me [pause] I’m wearing these new pants and I feel protected, I feel good, I don’t get headaches anymore.”

Interpreter to clinician: “He says that he is not afraid, he feels good, he doesn’t have headaches anymore.”²⁷

As a result of the interpreter’s incomplete translation, the clinician was left without the most diagnostically valuable information.²⁸

III. STATE AND FEDERAL GOVERNMENTS TAKE NOTICE

Courts at all levels struggled to find a way to ensure qualified interpreters were available to make accurate translations—thereby avoiding the problems cited above and giving meaning to the “right to an interpreter.”

23. *Id.* at 176 n.3. “The Spanish word ‘kilo’ can be translated into English as either ‘kilogram’ or ‘cent.’ Which word is the better translation depends on the dialect of the speaker and the context of the statement.” *Id.* Cuban speakers commonly use the word “kilo” to mean “cent,” and drug dealers usually do not use the word “kilo” to refer to cocaine, but instead use code words. *Id.* at 176 nn.3-4 (citing telephone interviews with federally certified interpreters).

24. *Id.* at 176.

25. *Id.* at 176 n.5. Since this defendant’s original words resided on a recorded telephone conversation, another more qualified interpreter was able to later review the accuracy of the translation, resulting in the conviction being overturned. If the translation error had instead occurred while the defendant was testifying, the error may have never been caught, because the defendant’s original Spanish words would not have been recorded and only the improperly translated English record would remain. *Id.*

26. Salimbene, *supra* note 2, at 651 (citing Minnesota and Oregon statutes as examples).

27. *Id.* at 651-52 (quoting ROSEANN DUENAS GONZÁLEZ ET AL., *FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY & PRACTICE* 479-80 (1991)).

28. *See id.* at 652.

A. *The Court Interpreters Act of 1978*

The federal government was the first to move beyond the right to an interpreter and focus on the “quality of the interpretation.”²⁹ The Court Interpreters Act required the Director of the Administrative Office of the United States Courts to “establish a program to facilitate the use of certified and otherwise qualified interpreters” in federal proceedings.³⁰ This certification task itself turned out to be intricate and costly.³¹

In creating certification requirements, the Administrative Office recognized the need for a “highly complex” interpreter skill set.³² Specifically, a qualified interpreter must be skilled in three forms of interpretation: simultaneous, consecutive, and sight.³³ Simultaneous translation is required for parties and

29. Mollie M. Pawlosky, Case Note, *When Justice is Lost in the “Translation”*: *Gonzalez v. United States, an “Interpretation” of the Court Interpreters Act of 1978*, 45 DEPAUL L. REV. 435, 468 (1996).

30. 28 U.S.C.A. § 1827(a) (West 2007).

31. The federal certification “program is maintained at a cost of approximately \$400,000 annually.” NCSC, RESOURCE MATERIAL, *supra* note 1, at 90.

32. Administrative Office of the United States Courts, *Federal Court Interpreter Information Sheet*, <http://www.uscourts.gov/interpretprog/infosheet.html> [hereinafter Administrative Office, *Federal Court Interpreter Information Sheet*].

33. The Administrative Office defined the three forms of interpretation:

“Simultaneous Interpretation” means the instantaneous oral reproduction of speech from one language to another. This requires the interpreter to listen, comprehend, convert into the target language, and reproduce a speaker’s or signer’s message in the target language while the speaker or signer continues to speak or sign, typically lagging a matter of seconds behind the speaker’s or signer’s communication. The simultaneous mode is used by interpreters when interpreting all that is said in courtroom proceedings for non-English speaking defendants.

“Consecutive Interpretation” means interpretation that requires the interpreter to listen, comprehend, render into the target language, and reproduce the original message in the target language after the speaker or signer pauses, such as in the “question and answer” mode in which the speaker completes a statement and the interpreter begins to interpret after the statement is completed. The consecutive mode is used with non-English speaking parties on the stand or at the lectern.

“Sight Translation” is the oral rendition of the text of a written document. The interpreter first reviews the original text, then renders it orally into the other language. Sight translation is distinguished from the general meaning of translation, which is rendering a written source language document into a written target language document, in that sight translation is done on sight (upon reading): the parallel text is spoken verbally, and not prepared in writing.

Administrative Office of the United States Courts, *Contract Court Interpreter Services Terms and Conditions*, http://www.uscourts.gov/interpretprog/Terms_Conditions.pdf.

consecutive translation for witnesses, although judges have discretion to authorize additional interpretation where necessary.³⁴

In each form of interpretation, the interpreter must be able to render precise translation “without any additions, omissions or other misleading factors that in any way alter the intended meaning of the message from the source language speaker.”³⁵ She must also be able to understand and negotiate herself through the unique nature of judicial proceedings, including the use of “specialized and legal terminology, formal and informal registers, dialect and jargon, varieties in language and nuances of meaning.”³⁶ All of this must be done without bias and while maintaining certain professional standards.³⁷ To ensure interpreters understand and abide by their professional and ethical responsibilities, the Administrative Office created a Code of Conduct³⁸ and requires interpreters to take an oath.³⁹ The Administrative Office further classified three categories of interpreters for potential use in federal courts: certified interpreters, professionally qualified interpreters, and language-skilled interpreters.⁴⁰

Federal certification programs currently exist for Spanish, Navajo and Haitian-Creole.⁴¹ The Administrative Office continues to develop procedures for the other languages most represented in federal courts.⁴² To become a federally certified court interpreter, an applicant must first pass a written examination, successful completion of which allows the applicant to register for an oral test.⁴³

34. 28 U.S.C.A. § 1827(k).

35. Administrative Office, *Federal Court Interpreter Information Sheet*, *supra* note 32.

36. *Id.*

37. *Id.*

38. Court interpreters are “officers of the court,” and “are expected to follow the Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts.” The Canons address nine topics: (1) Accuracy and Completeness; (2) Representation of Qualifications; (3) Impartiality, Conflicts of Interest, and Remuneration and Gifts; (4) Professional Demeanor; (5) Confidentiality; (6) Restriction of Public Comment; (7) Scope of Practice; (8) Assessing and Reporting Impediments to Performance; and (9) Duty to Report Ethical Violations. Administrative Office of the United States Courts, *Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts*, http://www.uscourts.gov/interpretprog/Standards_for_Performance.pdf [hereinafter Administrative Office, *Standards for Professional Responsibility*].

39. Federal Rule of Evidence 604 requires interpreters to be administered an oath. FED. R. EVID. 604. “The oath or affirmation of the interpreter is to make a ‘true translation’ which requires that the interpreter communicate exactly what the witness is expressing in his testimony. An interpreter for a criminal defendant is also required to interpret everything said in the courtroom.” 2 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 604:1 (6th ed. 2007).

40. Administrative Office, *Federal Court Interpreter Information Sheet*, *supra* note 32.

41. *Id.*

42. Federal courts primarily require Spanish interpreters, but they also need interpreters in other languages, including Chinese (Mandarin, Cantonese, and Foochow), Vietnamese, Korean, Russian, and Arabic. *Id.*

43. Administrative Office of the United States Courts, *Federal Court Interpreter Certification*

An applicant must successfully pass both the oral and written portions to become certified.⁴⁴ Achieving certification takes a minimum of two years because the written examination is administered one year, and the oral examination is administered the following year.⁴⁵

The two examinations are difficult and comprehensive. The written test, for example, typically requires “college level proficiency,” and the oral examination usually requires training in the three forms of interpreting (simultaneous, consecutive, and sight).⁴⁶ To ensure the interpreter can function accurately in a live courtroom setting,

[T]he oral portion is conducted in a simulated courtroom and tests the candidate’s use of formal language, slang, and colloquialisms. A jury charge and defense opening statement taken from actual trial transcripts have been used in past examinations. Candidates also have been required to interpret direct testimony and direct and cross examination questions, as well as translate probation reports and power of attorney forms. During the oral examination, each candidate is reviewed by a panel consisting of an active court interpreter, a specialist in the [target] language, and an international conference interpreter.⁴⁷

The lack of readily available training and the complexity of the oral and written examinations have made building a substantial corps of interpreters a slow proposition. The first certification examination was held in 1980, and today there are only 940 federally certified Spanish interpreters, 12 federally certified Haitian-Creole interpreters, and 8 federally certified Navajo interpreters.⁴⁸

When there is need to interpret one of the languages for which a certification regimen has been established (Spanish, Navajo, and Haitian-Creole),⁴⁹ federal courts may use only certified interpreters unless the judge, with the assistance of the Director of the Administrative Office, determines that a certified interpreter is not reasonably available.⁵⁰ In those situations, the court may use only professionally qualified interpreters or language-skilled interpreters.⁵¹

Examination Information, Frequently Asked Questions, http://www.ncsconline.org/D_Research/Consort-interp/fcice_exam/faq.htm.

44. *Id.*

45. *Id.*

46. Pawlosky, *supra* note 29, at 470.

47. *Id.* at 469-70.

48. E-mail from Carolyn J. Kinney, Ph.D., Federal Court Interpreting Program, District Court Administration Division, Administrative Office of the U.S. Courts (Feb. 27, 2007, 09:07 EST) (on file with author).

49. Currently Cantonese and Mandarin language tests are being developed, and federal courts have proposed creating “otherwise qualified” procedures for Arabic, Hebrew, Italian, Mien, Polish, and Russian. NCSC, RESOURCE MATERIAL, *supra* note 1, at 93.

50. See 28 U.S.C.A. § 1827(b)(2), (d)(1) (West 2007); see also Administrative Office, *Federal Court Interpreter Information Sheet*, *supra* note 32.

51. The Administrative Office’s definitions follow:

This structure seeks to avoid the sort of interpretation problems cited earlier. The federal government's unified approach towards remedying these problems has proven to be a suitable model for the states.

B. Indiana's Initiatives on Interpreter Needs

Indiana recognized the need for a coordinated approach to language interpretation due largely to the findings and recommendations of the Indiana Supreme Court Commission on Race and Gender Fairness.⁵² The Commission's subcommittee on language and cultural barriers surveyed Indiana judges, attorneys, court employees, and court users concerning issues of language and cultural barriers in the legal system.⁵³ This survey documented the many interpreter problems Indiana courts faced on a daily basis,⁵⁴ and plainly indicated the growing need for interpreters in Indiana courts.⁵⁵

"Professionally qualified" interpreters. . . . An individual with previous employment as a conference or seminar interpreter with any United States agency or with the United Nations or a similar entity may be deemed "professionally qualified" if the condition for employment includes successfully passing an interpreter examination. Another way to be deemed "professionally qualified" is to be a member in good standing in a professional interpreter association that requires a minimum of 50 hours of conference interpreting experience in the language(s) of expertise and the sponsorship of three active members of the same association who have been members for at least two years and whose language(s) are the same as the applicant's, and who will attest to having witnessed the applicant's performance and to the accuracy of the statements on the application. . . .

Language-skilled interpreters. Interpreters . . . who can demonstrate to the satisfaction of the court their ability to effectively interpret from the foreign language into English and vice versa in court proceedings, can be classified as "language skilled" interpreters.

Administrative Office, *Federal Court Interpreter Information Sheet*, *supra* note 32.

52. Indiana State Court Administration, *Court Interpreter Certification Program, About the Program*, <http://www.in.gov/judiciary/interpreter/about.html> [hereinafter *State Court Administration, About the Court Interpreter Program*].

53. RACE AND GENDER FAIRNESS COMMISSION, INDIANA SUPREME COURT COMMISSION ON RACE AND GENDER FAIRNESS EXECUTIVE REPORT AND RECOMMENDATIONS 14 (Dec. 20, 2002), available at <http://www.in.gov/judiciary/fairness/pubs/fairness-final-report.pdf> [hereinafter *RACE AND GENDER FAIRNESS COMM., EXECUTIVE REPORT*].

54. The research indicated "that Indiana [was] ill-prepared to deal with persons who do not speak English or have limited understanding of English, whether these persons appear[ed] in court as victims of crime, witnesses, civil litigants, or criminal defendants." *State Court Administration, About the Court Interpreter Program*, *supra* note 52.

55. Population data alone demonstrated the obvious reality that non-English speakers were commonly entering Indiana courts to face English-speaking judges and court staff:

The 2000 U.S. Census reported that more than 362,000 persons over age 5 in Indiana or 6.4 percent of the population spoke languages other than English in their homes and 40 percent of them reported that they speak English less than well. . . . More than

“Of the 247 judges who responded” to the 2001 survey, “90.3 percent reported having used translators for non-English speakers in their courtrooms [within the] past five years and 89.5 percent had used an interpreter in the past six months.”⁵⁶ Of these judges, “54.7 percent had used interpreters between one and 10 times during that period, [and astoundingly] 4.9 percent had used interpreters more than 100 times.”⁵⁷

Judges most commonly reported using Spanish interpreters in Indiana courts (84.6%), followed by Vietnamese (10.1%), Chinese (9.7%), and Russian (6.1%).⁵⁸ However, “[s]urveys of attorneys and court personnel revealed that courtroom interpreters also had been used for Polish, German, Japanese, Korean, Arabic, French, Greek, Ethiopian, Punjabi, Croatian, Serbian, Lithuanian, Macedonian, Czech, Thai, Burmese, Tongan and Rumanian.”⁵⁹

Unsurprisingly, Indiana judges were not always able to fulfill such needs. Of the judges surveyed, 30% were unable to find an interpreter when one was needed for a judicial proceeding.⁶⁰ These judges reported that “due to the unavailability of interpreters *qualified* to translate the required language,” they were forced to develop alternative strategies.⁶¹ Such strategies included postponements, and allowing family members, friends, bilingual counsel, or other court personnel to interpret.⁶²

Even when judges were able to locate a potential interpreter, they were often unable to determine whether she was properly qualified.⁶³ Judges were left on their own to assess what level of proficiency might be adequate and to measure whether a possible interpreter possessed these capabilities.⁶⁴ The lack of formal process and shortage of interpreters sometimes led judges to rely on interpretation by untrained, uneducated, and sometimes obviously biased individuals.⁶⁵

186,000 residents of Indiana over age 5 or 3.1 percent of the population were born outside the U.S. and more than half entered the country after 1990. Moreover, while the total population of Indiana was projected to increase by about 8.2 percent between 2000 and 2025, the Hispanic population is expected to increase at a rate of approximately 73.6 percent.

RACE AND GENDER FAIRNESS COMM., EXECUTIVE REPORT, *supra* note 53, at 14.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at app. A7.

61. *Id.* (emphasis added).

62. *Id.* at app. A5.

63. *Id.* at app. A7.

64. The judges’ survey results revealed that 66.4% of judges “had no minimum standards against which interpreters’ credentials were checked,” and 18.2% of judges had “no process in place for checking interpreter credentials.” *Id.*

65. The “Commission heard reports of fraudulent conduct by persons acting as interpreters, reliance upon friends and family members untrained in the law and not well educated in either

Based on these findings, the Commission recommended to the Indiana Supreme Court that Indiana develop a statewide court interpreter system.⁶⁶ Indiana subsequently joined a collaborative enterprise established by the National Center for State Courts, the Court Interpreter Certification Consortium, and implemented an Indiana court interpreter testing and certification system for Spanish, closely modeled after the Consortium procedures.⁶⁷

Indiana gained a wealth of knowledge and resources simply by joining the Consortium. The National Center for State Courts launched this collaborative effort in 1995, after states individually assessed their interpreter needs and “concluded that interpreter certification is the best method to protect the constitutional rights of court participants with limited English proficiency.”⁶⁸ Because the cost of implementing reliable certification procedures for the many necessary languages could not be shouldered by any individual state, the Consortium was developed “to facilitate court interpretation test development and administration standards, to provide testing materials, to develop educational programs and standards, and to facilitate communication among the member states and entities.”⁶⁹ This collective approach allows member states to pool their resources with a goal of ensuring qualified interpretation in the country’s courtrooms.

By mid-2006, thirty-six states had joined the Consortium, and tests have now been developed for Arabic, Cantonese, French, Haitian-Creole, Hmong, Korean, Laotian, Mandarin, Portuguese, Russian, Serbian, Somali, Spanish, and Vietnamese.⁷⁰ Aside from developing and sharing tests and testing procedures, the National Center’s Consortium also developed a “Model Interpreters Act.”⁷¹

language Of even greater concern were reports of police officers serving as interpreters in criminal court proceedings . . . despite their obvious conflict of interest.” State Court Administration, *About the Court Interpreter Program*, *supra* note 52.

66. *Id.*

67. *See id.*

68. State Court Administration, *About the Court Interpreter Program*, *supra* note 52; *see also* National Center for State Courts, *Consortium for State Court Interpreter Certification, Frequently Asked Questions, Research Services*, http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortCertFAQ.pdf.

69. State Court Administration, *About the Court Interpreter Program*, *supra* note 52.

70. National Center for State Courts, *Consortium for State Court Interpreter Certification, Member States*, http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortMemberStatesPubJune2006.pdf; *see also* National Center for State Courts, *Consortium for State Court Interpreter Certification, Tests*, http://www.ncsconline.org/wc/publications/Res_CtInte_ConsortCertTestsPub.pdf.

71. The “Model Interpreters Act” requires an interpreter oath and contains a “Model Code of Professional Responsibility for Interpreters in the Judiciary.” NCSC, RESOURCE MATERIAL, *supra* note 1, at 199-210, 217-33. Specifically, the Act requires all interpreters to “take an oath that they will make a true and impartial interpretation using their best skills and judgment in accordance with the standards and ethics of the interpreter profession.” *Id.* at 230. In addition, the Code of Professional Responsibility contains ten Canons that are nearly identical to those adopted by federal

With the assistance of resources from the Consortium, Indiana devised a Spanish interpreter certification program.⁷² Unlike the federal effort, Indiana's certification program incorporates both training and testing, in the hope that a dual approach will build a larger corps of certified individuals more quickly.⁷³ To become certified in Indiana, a candidate must complete five steps:

- First: Attend the two-day court interpreter orientation that covers interpreter ethics, protocol, basic criminal procedure, and the three modes of interpretation used in the courtroom;
- Second: Pass a written exam covering vocabulary, criminal procedure, and court interpreter ethics with a score of 80% or better;
- Third: Pass all three portions of the National Consortium-approved interpreter certification oral exam with a score of 70% or better on each of three sections: sight translation, consecutive interpretation and simultaneous interpretation;
- Fourth: Submit to [and pass] a criminal background check;
- Fifth: Sign an oath promising to comply with the Indiana Supreme Court Interpreter Code of Conduct and Procedure.⁷⁴

The written examination tests three skill sets: (1) the English language, (2) court-related terms and usage, and (3) ethics and professional conduct.⁷⁵ In the oral examination, two certified interpreters who are trained as raters individually test the applicant in the three modes of interpretation (simultaneous, consecutive, and sight).⁷⁶ To date, Indiana has thirty-five certified Spanish court interpreters.⁷⁷ The hope is that incorporating training into the five-step testing procedure will allow more bilingual individuals to become certified, while ensuring court interpreters possess the necessary skill set.

Although Indiana only has certification procedures established for Spanish

courts: (1) Accuracy and Completeness; (2) Representation of Qualifications; (3) Impartiality and Avoidance of Conflict of Interest; (4) Professional Demeanor; (5) Confidentiality; (6) Restriction of Public Comment; (7) Scope of Practice; (8) Assessing and Reporting Impediments to Performance; (9) Duty to Report Ethical Violations; and (10) Professional Development. *Compare id.* at 199-210, with Administrative Office, *Standards for Professional Responsibility*, *supra* note 38.

72. State Court Administration, *Court Interpreter Certification Program Administrative Policies*, <http://www.in.gov/judiciary/interpreter/policies.html>.

73. State Court Administration, *Court Interpreter Certification Program, Get Certified*, <http://www.in.gov/judiciary/interpreter/getcertified.html> [hereinafter State Court Administration, *Get Certified*].

74. *Id.*

75. *Id.*

76. *Id.*

77. State Court Administration, *Court Interpreter Certification Program, Registry*, <http://www.in.gov/judiciary/interpreter/registry.html> [hereinafter State Court Administration, *Registry*].

interpreters, Indiana does permit certification by reciprocity.⁷⁸ “Reciprocity is available to out-of-state certified interpreters with Federal Certification or State Certification from National Center for State Courts Interpreter Consortium member states.”⁷⁹ This further allows Indiana to benefit from the Consortium membership by certifying interpreters in more languages than Spanish.⁸⁰

We encourage Indiana courts to use certified interpreters, partly through distribution of cash grants made possible by the Indiana General Assembly. Before any formal requirement for use of certified personnel could ever be considered, there must be a sufficient number of certified interpreters, and the process is slow. Still, the process exists, and it is through these recently adopted testing and certification procedures that Indiana can guarantee non-English speaking parties and witnesses the right to a qualified interpreter, at least for Spanish.

Still, what about the *immediate* problem when a judge is faced for the first time in her courtroom with a party or witness who speaks some other language? How should the judge timely locate an interpreter? Indiana recognized this need in 2005 and opened an account with “Language Line Services” for telephone interpretation.⁸¹ Language Line is “an over-the-phone interpretation service based in Monterey, California, which provides interpretation services in more than 140 languages,” every day of the year, around the clock.⁸²

Language-Line is only a temporary fix where *immediate* interpretation is necessary to allow the most basic communication. It is not meant to replace available certification programs, and Language-Line interpreters do not possess the full skill set that is necessary to ensure “quality” interpretations. For example, Language-Line interpreters may not be trained in the three forms of interpretation and may not be intimately familiar with courtroom language or processes.⁸³ But, the simple fact is that individuals present themselves in Indiana courts speaking everything from Mandarin to Urdu,⁸⁴ and we must find a way to communicate with these individuals while we locate more permanent

78. State Court Administration, *Court Interpreter Certification Program, Certification by Reciprocity*, <http://www.in.gov/judiciary/interpreter/reciprocity.html>.

79. *Id.* The applicant still must pass a criminal history background check with the Indiana State Police and must take a sworn oath to uphold the Indiana Court Interpreter Code of Ethics. *Id.*

80. Indiana has one certified Arabic interpreter. State Court Administration, *Registry*, *supra* note 77.

81. Press Release, Ind. Supreme Court, Supreme Court Arranges for \$25,000 in Translation Services (Oct. 5, 2005), *available at* <http://www.ai.org/judiciary/press/2005/1005.html>.

82. *Id.*; *see also* Adrienne Meiring, *New Program to Provide Limited Telephonic Foreign Language Interpretation for Indiana Courts*, INDIANA COURT TIMES, Summer/Fall 2005, at 2.

83. However, Language-Line interpreters do “have hundreds of hours of interpreting experience” and “are required to be familiar with police and 911 procedures.” Press Release, Ind. Supreme Court, *supra* note 81.

84. Chief Justice Randall T. Shepard, *State of the Judiciary Address: Indiana’s Place in American Court Reform: Rarely First, Occasionally Last, Frequently Early* (Jan. 12, 2006).

interpretation services. Illustrating its usefulness, Indiana has already used Language-Line interpreters to assist people who spoke French, Somalian, Russian, Mongolian, Yeman, Korean, and Mextaco (a Mexican regional dialect).⁸⁵

Beyond the right to an interpreter for parties and witnesses, however, Indiana hopes to serve people of all backgrounds, litigants, witnesses, relatives, and anyone else who enters the courthouse hoping for justice.⁸⁶ Indiana takes a serious view of how confusing and unmanageable the judicial system must be for non-English speaking individuals. Even the most seemingly simple questions, such as “What court do I go to?, When is my next court date?,” and “Where is the Clerk’s office?” can remain unanswered if court staff and personnel cannot communicate with those individuals that come through the doors.⁸⁷ In light of these concerns, just last year, hundreds of court employees, court clerks, and judges alike,⁸⁸ took it upon themselves to do more to tackle the language barrier by trooping off to Spanish class.⁸⁹

CONCLUSION

These initiatives are but a down payment on what remains to be done. They nevertheless represent a respectable effort to make Indiana a better home to people of all backgrounds—through ensuring that statutory and constitutional rights and access to justice are not lost in translation.

85. *Id.*

86. Chief Justice Randall T. Shepard, State of the Judiciary Address: Most Justice Happens in the County Courthouse (Jan. 17, 2007).

87. *Id.*

88. “Since the program started last summer, almost 500 people from local court offices and clerks’ offices have enrolled in this course from 34 different counties.” *Id.*

89. The Indiana Supreme Court partnered with Ivy Tech Community College to develop a WorkPlace Spanish® Training Program for Indiana’s courts, featuring twenty-four hours of classroom instruction and a textbook with companion CD. *Id.*

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2006*

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The current justices on the Indiana Supreme Court have served on the bench together for almost eight years. Two of the justices have been on the court for more than two decades and the five justices have collectively served more than 50 years on the court. Given the depth of experience shared by these five jurists, both on the court and in working with each other, seismic changes in the court's behavior is not expected. However, in the past several years, the voting statistics for these justices show that there are at least three trends of note in how the court acts that are instructive to parties taking an appeal to the Indiana Supreme Court.

First, unlike the United States Supreme Court, the Indiana Supreme Court justices have not traditionally fallen into blocks of votes that align in individual cases. While there is no reason to believe that there are any ideological fault lines on the court, there is a trend in which three justices are voting together more regularly than any other combination of justices. In 2006, Chief Justice Shepard and Justices Boehm and Sullivan were aligned together more than any other justices. The Chief Justice was aligned with Justice Boehm in 87.2% of all cases last year. Justice Sullivan was aligned with the Chief Justice in 86.2% of all cases and with Justice Boehm for the same amount. No other grouping of justices showed a similar level of agreement. This alignment has existed for at least the past several years, as each of these justices agreed with at least one of the other two in 85% of all cases since 2003. This is also the second straight year

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg LLP for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard. Many thanks to Kevin Betz, who initially developed this Article and worked hard to bring it to fruition in years past. The authors also must recognize Donald Glick (Mr. Stephenson's father-in-law) who spent Thanksgiving Day writing the spreadsheet that compiled the statistics.

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that these three justices have constituted the majority for more 3-2 opinions than any other combination of justices. Of the 60 split decisions since 2003, these three justices were the majority in almost one-third of the cases.

This alignment is not likely driven by any ideological tendencies of the three justices. As demonstrated in Table F, the court decides an enormous variety of cases in any given year. It would be virtually impossible for any three jurists to have substantially the same views in all of those areas over any period of time, particularly given the thoughtful analysis the court puts into each of its opinions. Instead, all five justices have the type of experience and familiarity with their colleagues necessary to build consensus and to craft opinions that gain the necessary votes for a majority. However, since Chief Justice Shepard, Justice Boehm, and Justice Sullivan have shown a tendency to vote in alignment in many cases, particularly in close cases, those coming before the court should be aware of that tendency.

Second, while the number of petitions to transfer continues to increase, the number of civil petitions accepted by the court continues to drop. For instance, in 2003 and 2004, the court granted 63 and 46 civil petitions to transfer, respectively. In 2005, that number rose slightly to 49. However, the court accepted fewer civil petitions in 2006, granting only 30.

At the same time, the number of petitions to transfer submitted to the court continues to rise. While the court only received 839 petitions in 2004, the number rose to 926 in 2006. The justices are therefore reviewing close to an additional 100 extra petitions (or 300 extra briefs) while producing approximately the same number of cases and attending to the other duties accompanying their positions. This trend is likely to continue and it appears inevitable that the court will hear upwards of 1000 petitions to transfer in the coming years.

As one would expect, this increase in petitions and decrease in the number accepted means that the percentage of petitions to transfer granted by the court continues to decline. In 2003, the court granted 12% of all petitions to transfer filed in criminal or civil cases. In 2006, that percentage dropped to 7%. The lesson from the data is clear—while the odds of having a petition being granted grow longer each year, Indiana practitioners continue to file them at near historic levels.

Third, the court affirmed a remarkable number of civil cases in 2006, which might be a clue as to when the court will grant transfer in civil cases. In previous years, the court has only rarely affirmed civil cases that came before it on transfer. For instance, the court affirmed only *one* civil transfer case in 2005. However, the court affirmed 22% of its civil transfer cases last year. This increase bears monitoring in future years, as it might indicate a growing willingness of the court to grant transfer in cases even when it believes the lower courts reached the right result.

Table A. The court issued 106 opinions in 2006, which was an increase from the number of opinions in 2005. Justice Boehm authored almost one-third of all of the court's cases. He handed down 32 opinions and authored the most civil opinions (22) and the second most criminal opinions (12) out of all the justices.

Table B-1. In looking at the alignment between the individual justices, it is not difficult to see why Justice Boehm authored a large percentage of the civil opinions for 2006, as he was consistently aligned with several of the other justices. Justice Boehm agreed with Chief Justice Shepard and with Justice Sullivan in 87.3% of all civil cases in 2006. He agreed with Justice Dickson in 87.1% of all civil cases. The least amount of agreement was between Justices Rucker and Sullivan, who agreed in only 73% of civil cases.

Table B-2. As with civil cases, Chief Justice Shepard, Justice Boehm and Justice Sullivan agreed in more instances than any other alignment of justices in criminal cases. Chief Justice Shepard voted with Justice Boehm and Justice Sullivan each in 87% of criminal cases. The justice least aligned with his colleagues was Justice Dickson, who did not agree with a single other justice more than 80% of the time.

Table B-3. Not surprisingly, the triumvirate comprising the Chief Justice, Justice Boehm and Justice Sullivan were the most aligned with regard to the overall statistics. The Chief Justice and Justice Boehm were aligned in 87.2% of all cases, more than any other pair. Justice Sullivan was aligned with those two in 86.2% of all cases for each justice.

Table C. The percentage of unanimous opinions remained roughly the same as in 2005. For 2006, 67% of the court’s opinions were unanimous. In 2005, 64.3% of the court’s opinions were unanimous, which was down sharply from the 72.5% of all cases in 2004.

Table D. While the court issued 21 3-2 decisions in 2005, the number dropped to 11 in 2006. The court therefore split on a 3-2 vote in less than 10% of all cases in 2006. The raw number of 3-2 decisions is the second lowest in the past five years, surpassed only by the 10 split decisions in 2004. Given the amount of alignment between them, it is not surprising that Chief Justice Shepard, Justice Boehm, and Justice Sullivan were the most consistent block of votes in 3-2 cases.

Table E-1. As one would expect, the court continues to reverse the lower courts in most instances. The court affirmed in 23.7% of the cases it handed down in 2006. It affirmed in 26% of all civil cases and only 21% of all criminal cases. However, the court affirmed 2 of the 4 direct criminal appeals and 3 of the 4 direct civil appeals. In sum, the court affirmed more than half of the cases to come to the court directly from an Indiana trial court. For cases coming to the court on transfer, the court affirmed only 20% of the time. However, this is an increase from 2005, where the court affirmed only 1 civil transfer case and 19 criminal transfer cases during the entire year.

Table E-2. More than 900 petitions to transfer were filed with the court last year. Of these, the court only granted 65, or 7%. The court accepted 30 civil petitions and 34 criminal petitions. However, the criminal petitions that the court granted only comprised 5.8% of all of those filed with the court in 2006.

Table F. The court continues to show a remarkable breadth and consistency in the types of cases that come before it. For instance, the court hands down an average of 4 opinions a year in the area of state and local tax and tax procedure, and this year was no exception. However, the court also has a tendency to revisit certain areas when there has not been a decision for a few years. For instance, the court handed down only 1 insurance law opinion in each of 2004 and 2005, but addressed that area of law six times in 2006. As for an area of law to which the court might return in upcoming years, the court has not handed down an environmental law opinion since 2004.

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	9	7	16	0	3	3	2	1	3
Dickson, J. ^e	3	16	19	2	2	4	4	3	7
Sullivan, J.	9	8	17	1	0	1	2	4	6
Boehm, J.	10	22	32	2	0	2	0	1	1
Rucker, J.	12	4	16	0	0	0	2	6	8
Per Curiam	1	5	6						
Total	44	62	106	5	5	10	10	15	25

^a These are opinions and votes on opinions by each justice and in per curiam in the 2006 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. See *id.* at 210.

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

^c This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Justice Dickson declined to participate in *Bonney v. Indiana Finance Authority*, 849 N.E.2d 473 (Ind. 2006).

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^f

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		51	52	55	47
	S		0	2	0	0
	D	---	51	54	55	47
	N		62	63	63	63
	P		82.3%	85.7%	87.3%	74.6%
Dickson, J.	O	51		48	54	49
	S	0		0	0	4
	D	51	---	48	54	53
	N	62		62	62	62
	P	82.3%		77.4%	87.1%	85.5%
Sullivan, J.	O	52	48		54	45
	S	2	0		1	1
	D	54	48	---	55	46
	N	63	62		63	63
	P	85.7%	77.4%		87.3%	73.0%
Boehm, J.	O	55	54	54		50
	S	0	0	1		0
	D	55	54	55	---	50
	N	63	62	63		63
	P	87.3%	87.1%	87.3%		79.4%
Rucker, J.	O	47	49	45	50	
	S	0	4	1	0	
	D	47	53	46	50	---
	N	63	62	63	63	
	P	74.6%	85.5%	73.0%	79.4%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 51 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES[§]

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		35	40	40	39
	S		1	0	0	0
	D	---	36	40	40	39
	N		46	46	46	46
	P		78.3%	87.0%	87.0%	84.8%
Dickson, J.	O	35		33	35	33
	S	1		0	1	0
	D	36	---	33	36	33
	N	46		46	46	46
	P	78.3%		71.7%	78.3%	71.7%
Sullivan, J.	O	40	33		39	39
	S	0	0		0	1
	D	40	33	---	39	40
	N	46	46		46	46
	P	87.0%	71.7%		84.8%	87.0%
Boehm, J.	O	40	35	39		39
	S	0	1	0		0
	D	40	36	39	---	39
	N	46	46	46		46
	P	87.0%	78.3%	84.8%		84.8%
Rucker, J.	O	39	33	39	39	
	S	0	0	1	0	
	D	39	33	40	39	---
	N	46	46	46	46	
	P	84.8%	71.7%	87.0%	84.8%	

[§] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 45 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES^h

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		86	92	95	86
	S		1	2	0	0
	D	---	87	94	95	86
	N		108	109	109	109
	P		80.6%	86.2%	87.2 %	78.9 %
Dickson, J.	O	86		81	98	82
	S	1		0	1	4
	D	87	---	81	90	86
	N	108		108	108	108
	P	80.6%		75.0%	83.3 %	79.6 %
Sullivan, J.	O	92	81		93	84
	S	2	0		1	2
	D	94	81	---	94	86
	N	109	108		109	109
	P	86.2%	75.0%		86.2 %	78.9 %
Boehm, J.	O	95	98	93		89
	S	0	1	1		0
	D	95	99	94	---	89
	N	109	108	109		109
	P	87.2%	91.7 %	86.2%		81.7 %
Rucker, J.	O	86	82	84	89	
	S	0	4	2	0	
	D	86	86	86	89	--
	N	109	108	109	109	
	P	78.9%	79.6%	78.9 %	81.7%	

^h This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 86 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2006. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C
UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASESⁱ

Unanimous ^j			Unanimous with Concurrence ^k			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
30	39	69 (67.0%)	5	5	10 (9.7%)	9	15	24 (23.3%)	103

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court’s opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
3-2 DECISIONS¹

Justices Constituting the Majority	Number of Opinions ^m
1. Shepard, C.J., Sullivan, J., Boehm, J.	3
2. Shepard, C.J., Rucker, J., Sullivan, J.	1
3. Shepard, C.J., Dickson, J., Boehm, J.	2
4. Shepard, C.J., Dickson, J., Rucker, J.	1
5. Dickson, J., Boehm, J., Rucker, J.	3
6. Sullivan, J., Boehm, J., Rucker, J.	1
Total ⁿ	11

¹ This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

ⁿ The 2006 term’s 3-2 decisions were:

1. Shepard, C.J., Sullivan, J., Boehm, J.: *R&D Transp., Inc. v. A.H.*, 859 N.E.2d 332 (Ind. 2006) (Sullivan, J.); *Holcomb v. Water’s Dimmick Petroleum, Inc.*, 858 N.E.2d 103 (Ind. 2006) (Sullivan, J.); *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130 (Ind. 2006) (Shepard, C.J.); *Vaughn v. Daniels Co. (WV)*, 841 N.E.2d 1133 (Ind. 2006) (Boehm, J.)

2. Shepard, C.J., Rucker, J., Sullivan, J.: *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006) (Rucker, J.).

3. Shepard, C.J., Dickson, J., Boehm, J.: *Staton v. State*, 853 N.E.2d 470 (Ind. 2006) (Boehm, J.); *Ryker Painting Co. v. Nunamaker*, 849 N.E.2d 1116 (Ind. 2006) (Dickson, J.).

4. Shepard, C.J., Dickson, J., Rucker, J.: *Midtown Chiropractic v. Ill. Farmers Ins. Co.*, 847 N.E.2d 942 (Ind. 2006) (Dickson, J.).

5. Dickson, J., Boehm, J., Rucker, J.: *Timberlake v. State*, 859 N.E.2d 1209 (Ind. 2007) (Dickson, J.); *Porter County Sheriff v. Guzorek*, 857 N.E.2d 363 (Ind. 2006) (Boehm, J.); *In re Hammer*, 847 N.E.2d 960 (Ind. 2006) (Dickson, J.).

6. Sullivan, J., Boehm, J., Rucker, J.: *Sellmer v. State*, 842 N.E.2d 358 (Ind. 2006) (Sullivan, J.).

TABLE E-1
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed or Vacated ^p	Affirmed	Total
Civil Appeals Accepted for Transfer	39 (78.0%)	11 (22.0%)	50
Direct Civil Appeals	1 (25.0%)	3 (75.0%)	4
Criminal Appeals Accepted for Transfer	32 (82.1%)	7 (17.9%)	39
Direct Criminal Appeals	2 (50.0%)	2 (50.0%)	4
Total	74 (76.3%)	23 (23.7%)	97 ^q

^o Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56, 63 (pursuant to Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

^p Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, “reverse” or “vacate” simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

^q This does not include 4 attorney discipline opinions, 1 original opinion, 1 remand opinion, 1 order staying execution, or 2 opinions related to certified questions. These opinions did not reverse, vacate, or affirm any other court’s decision.

TABLE E-2
DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 2006^r

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^s	248 (89.2%)	30 (10.8%)	278
Criminal ^t	551 (94.2%)	34 (5.8%)	585
Juvenile	62 (98.4%)	1 (1.6%)	63
Total	861 (93.0%)	65 (7.0%)	926

^r This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APP. R. 58(A).
^s This also includes petitions to transfer in tax cases and workers' compensation cases.
^t This also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^u

Original Actions	Number
• Certified Questions	2 ^y
• Writs of Mandamus or Prohibition	0
• Attorney Discipline	4 ^w
• Judicial Discipline	0
Criminal	
• Death Penalty	2 ^x
• Fourth Amendment or Search and Seizure	11 ^y
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	2 ^z
Real Estate or Real Property	4 ^{aa}
Personal Property	0
Landlord-Tenant	0
Divorce or Child Support	3 ^{bb}
Children in Need of Services (CHINS)	0
Paternity	0
Product Liability or Strict Liability	2 ^{cc}
Negligence or Personal Injury	7 ^{dd}
Invasion of Privacy	0
Medical Malpractice	4 ^{ee}
Indiana Tort Claims Act	3 ^{ff}
Statute of Limitations or Statute of Repose	0
Tax, Department of State Revenue, or State Board of Tax Commissioners	4 ^{gg}
Contracts	6 ^{hh}
Corporate Law or the Indiana Business Corporation Law	1 ⁱⁱ
Uniform Commercial Code	1 ^{jj}
Banking Law	0
Employment Law	3 ^{kk}
Insurance Law	6 ^{ll}
Environmental Law	0
Consumer Law	0
Workers' Compensation	1 ^{mm}
Arbitration	1 ⁿⁿ
Administrative Law	3 ^{oo}
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	0
Indiana Constitution	13 ^{pp}

^u This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2006. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this Table.

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- ^v *Cantrell v. Morris*, 849 N.E.2d 488 (Ind. 2006); *In re Guidant Shareholders Derivative Litig.*, 841 N.E.2d 571 (Ind. 2006).
- ^w *In re Moores*, 854 N.E.2d 350 (Ind. 2006); *In re Hammar*, 847 N.E.2d 960 (Ind. 2006); *In re Anonymous*, 845 N.E.2d 145 (Ind. 2006); *In re Hill*, 840 N.E.2d 316 (Ind. 2006).
- ^x *Voss v. State*, 856 N.E.2d 1211 (Ind. 2006); *Corcoran v. State*, 845 N.E.2d 1019 (Ind. 2006).
- ^y *Kendall v. State*, 849 N.E.2d 1109 (Ind. 2006); *Lee v. State*, 849 N.E.2d 602 (Ind. 2006); *Hardister v. State*, 849 N.E.2d 563 (Ind. 2006); *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006); *Trimble v. State*, 842 N.E.2d 798 (Ind. 2006); *Sellmer v. State*, 842 N.E.2d 358 (Ind. 2006); *Kellems v. State*, 842 N.E.2d 352 (Ind. 2006); *State v. Quirk*, 842 N.E.2d 334 (Ind. 2006); *Taylor v. State*, 842 N.E.2d 327 (Ind. 2006); *City of Vincennes v. Emmons*, 841 N.E.2d 155 (Ind. 2006).
- ^z *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528 (Ind. 2006); *Lasater v. House*, 841 N.E.2d 553 (Ind. 2006).
- ^{aa} *Kozlowski v. Dordieski*, 849 N.E.2d 535 (Ind. 2006); *Dutchmen Mfg. Inc. v. Reynolds*, 849 N.E.2d 516 (Ind. 2006); *Metro Dev. Comm'n of Marion County v. Pinnacle Media, LLC*, 846 N.E.2d 654 (Ind. 2006); *City of Vincennes v. Emmons*, 841 N.E.2d 155 (Ind. 2006).
- ^{bb} *Brown v. Brown*, 849 N.E.2d 610 (Ind. 2006); *K.S. v. State*, 849 N.E.2d 538 (Ind. 2006); *Shelton v. Shelton*, 840 N.E.2d 835 (Ind. 2006).
- ^{cc} *Schultz v. Ford*, 857 N.E.2d 977 (Ind. 2006); *Vaughn v. Daniels Co. (WV)*, 841 N.E.2d 1133 (Ind. 2006).
- ^{dd} *Helms v. Carmel High Sch. Vocational Bldg. Trades Corp.*, 854 N.E.2d 345 (Ind. 2006); *Funston v. Sch. Town of Munster*, 849 N.E.2d 595 (Ind. 2006); *Cavens v. Zaberdac*, 849 N.E.2d 526 (Ind. 2006); *Dutchmen Mfg. Inc. v. Reynolds*, 849 N.E.2d 516 (Ind. 2006); *Cain v. Griffin*, 849 N.E.2d 507 (Ind. 2006); *Ellenwine v. Fairley*, 846 N.E.2d 657 (Ind. 2006); *Willis v. Westerfield*, 839 N.E.2d 1179 (Ind. 2006).
- ^{ee} *Cavens v. Zaberdac*, 849 N.E.2d 526 (Ind. 2006); *Schriber v. Anonymous*, 848 N.E.2d 1061 (Ind. 2006); *Ellenwine v. Fairley*, 846 N.E.2d 657 (Ind. 2006); *Ledbetter v. Hunter*, 842 N.E.2d 810 (Ind. 2006).
- ^{ff} *Cantrell v. Morris*, 849 N.E.2d 488 (Ind. 2006); *Patrick v. Miresso*, 848 N.E.2d 1083 (Ind. 2006); *City of Indianapolis v. Garman*, 848 N.E.2d 1087 (Ind. 2006).
- ^{gg} *Dep't of Local Gov't Fin. v. Roller Skating Rink Operators Ass'n*, 853 N.E.2d 1262 (Ind. 2006); *Packard v. Shoopman*, 852 N.E.2d 927 (Ind. 2006); *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065 (Ind. 2006); *Wayne County Prop. Tax Assessment Bd. of Appeals v. United Ancient Order of Druids Grove*, 847 N.E.2d 924 (Ind. 2006).
- ^{hh} *Dutchmen Mfg. Inc. v. Reynolds*, 849 N.E.2d 516 (Ind. 2006); *Cain v. Griffin*, 849 N.E.2d 507 (Ind. 2006); *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663 (Ind. 2006); *Midtown Chiropractic v. Ill. Farmers Ins. Co.*, 847 N.E.2d 942 (Ind. 2006); *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130 (Ind. 2006); *Coca-Cola Co. v. Babyback's Int'l, Inc.*, 841 N.E.2d 557 (Ind. 2006).
- ⁱⁱ *Keaton & Keaton v. Keaton*, 842 N.E.2d 816 (Ind. 2006).
- ^{jj} *Money Store Inv. Corp. v. Summers*, 849 N.E.2d 544 (Ind. 2006).
- ^{kk} *Ryker Painting Co. v. Nunamaker*, 849 N.E.2d 1116 (Ind. 2006); *N. Ind. Pub. Serv. Co. v. Bloom*, 847 N.E.2d 175 (Ind. 2006); *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130 (Ind. 2006).
- ^{ll} *Cain v. Griffin*, 849 N.E.2d 507 (Ind. 2006); *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663 (Ind. 2006); *Midtown Chiropractic v. Ill. Farmers Ins. Co.*, 847 N.E.2d 942 (Ind. 2006); *N. Ind. Pub. Serv. Co. v. Bloom*, 847 N.E.2d 175 (Ind. 2006); *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279 (Ind. 2006); *Allstate Ins. Co. v. Fields*, 842 N.E.2d 804 (Ind. 2006).
- ^{mm} *DePuy, Inc. v. Farmer*, 847 N.E.2d 160 (Ind. 2006).
- ⁿⁿ *Natare Corp. v. D.S.I.*, 855 N.E.2d 985 (Ind. 2006).
- ^{oo} *Kozlowski v. Dordieski*, 849 N.E.2d 535 (Ind. 2006); *Wayne County Prop. Tax Assessment Bd. of Appeals v. United Ancient Order of Druids Grove*, 847 N.E.2d 924 (Ind. 2006); *City of Vincennes v. Emmons*, 841 N.E.2d 155 (Ind. 2006).

^{PP} Alpha Psi Chapter of Pi Kappa Alpha v. Auditor of Monroe County, 849 N.E.2d 1131 (Ind. 2006); Cantrell v. Morris, 849 N.E.2d 488 (Ind. 2006); Bonney v. Ind. Fin. Auth., 849 N.E.2d 473 (Ind. 2006); Childress v. State, 848 N.E.2d 1073 (Ind. 2006); State v. Spillers, 847 N.E.2d 949 (Ind. 2006); Holder v. State, 847 N.E.2d 930 (Ind. 2006); Fuchs v. Martin, 845 N.E.2d 1038 (Ind. 2006); Nagy v. Evansville-Vandenburg Sch. Corp., 844 N.E.2d 481 (Ind. 2006); Ledbetter v. Hunter, 842 N.E.2d 810 (Ind. 2006); Trimble v. State, 842 N.E.2d 798 (Ind. 2006); Sellmer v. State, 842 N.E.2d 358 (Ind. 2006); State v. Quirk, 842 N.E.2d 334 (Ind. 2006); Taylor v. State, 842 N.E.2d 327 (Ind. 2006).

SURVEY OF ADMINISTRATIVE LAW

JENNIFER WHEELER TERRY*

INTRODUCTION

Administrative law concerns how state and local agencies act, whether through rulemaking or adjudication, and whether they act within the scope of authority given to the agency by the legislature. In 1927, Justice Frankfurter called administrative law

“filing [sic] in the details” of a policy set forth in statutes. But the “details” are of the essence; they give meaning and content to vague contours. The control of banking, insurance, public utilities, finance, industry, the professions, health and morals, in sum, the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revision. These powers are lodged in a vast congeries of agencies.¹

This survey Article² focuses on the statutory framework that covers many of the state and local agencies: the Administrative Orders and Procedures Act (“AOPA”);³ the Administrative Rules and Procedures Act (“ARPA”);⁴ and the Open Door⁵ and Records Acts.⁶

I. JUDICIAL REVIEW

AOPA applies to many, but not all, administrative agencies in Indiana. Indiana Code section 4-21.5-2-4 exempts several administrative agencies from AOPA, including the Indiana Utility Regulatory Commission (“IURC”), State Department of Revenue, and the Department of Workforce Development.⁷ The statutory review for non-AOPA agencies is frequently similar to AOPA and the cases from the survey period will therefore be discussed together, but non-AOPA

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1. Stephen T. Maher, *The Continuing Task of Administrative Law*, ADMIN. L. SEC. NEWSL. (Admin. Law Section of the Fla. Bar), Mar. 1996, at 1, 2, <http://www.usual.com/article2.htm> (quoting Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 621 (1927)).

2. This Article reviews published Indiana decisions in the area of administrative law from October 2005 to September 2006.

3. IND. CODE §§ 4-21.5-1 to -7, -9 (2005). There were very few statutory changes to AOPA during the survey period. The only change of substance was to add “determination of status as a member of or participant in an environmental performance based program developed and implemented under IC 13-27-8.” *Id.* § 4-21.5-2-5(17).

4. *Id.* § 4-22-1.

5. *Id.* § 5-14-1.5.

6. *Id.* § 5-14-3.

7. *Id.* § 4-21.5-4.4.

cases will be noted because of differences in judicial gloss on those standards.

A. Standard of Review

Indiana's AOPA provides the following standard of judicial review of agency actions: a court may provide relief only if the agency action is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.⁸

Judicial review of agency actions is generally very deferential to the agency. The same standard of review applies regardless of whether the administrative agency actively participates in the appeal.⁹ Several cases during the survey period illustrate the bounds of the standard for review of administrative actions.

1. *Arbitrary and Capricious Action*.—In *Indiana State Board of Health Facility Administrators v. Werner* (*Werner I*)¹⁰ the State Board of Health Facility Administrators ("Health Facility Board") sanctioned Werner, an administrator, by suspending her license and requiring her to pay costs of the disciplinary proceeding.¹¹ In the administrative proceeding, an administrative law judge ("ALJ") recommended a censure for Werner, a less severe punishment.¹² The issue was appealed to the Health Facility Board, who after receiving briefs and hearing oral arguments, rejected the ALJ's recommendation and imposed a sanction suspending Warner's license and assessing costs.¹³

Werner sought judicial review of the Board's decision, and the trial court found that the Health Facility Board's decision was arbitrary and capricious.¹⁴ The court of appeals applied the standard that "[a] decision is arbitrary and capricious if it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency."¹⁵ "A decision may also be arbitrary and capricious where only speculation furnishes the basis for a decision."¹⁶ The court of appeals

8. *Id.* § 4-21.5-5-14.

9. *Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 162 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 590 (Ind. 2006).

10. 841 N.E.2d 1196 (Ind. Ct. App.), *reh'g*, 846 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 591 (Ind. 2006). The order on rehearing addressing other issues is discussed elsewhere in this Article and is referred to as *Werner II*.

11. *Werner I*, 841 N.E.2d at 1198.

12. *Id.* at 1202.

13. *Id.* at 1203-04.

14. *Id.*

15. *Id.* at 1206 (citing *Ind.-Ky. Elec. Corp. v. Comm'r, Ind. Dep't of Env'tl. Mgmt.*, 820 N.E.2d 771, 776 (Ind. Ct. App. 2006)).

16. *Id.* at 1206 (citing *Ind. State Bd. of Registration & Educ. for Health Facility Adm'rs v.*

stated that “[s]imply said, an agency decision is arbitrary and capricious where there is no reasonable basis for the decision.”¹⁷

The court of appeals found the Health Facility Board’s decision arbitrary and capricious because the Board failed to provide any explanation for why it decided to impose a significantly more severe sanction than that recommended by the ALJ.¹⁸ The Health Facility Board “adopted the ALJ’s findings and conclusions in their entirety” but imposed a different sanction without any explanation for why it reached a different conclusion.¹⁹

Agency action was also challenged as being arbitrary and capricious in *Indiana State Real Estate Commission v. Martin*.²⁰ In *Martin*, a real estate broker appealed the Indiana Real Estate Commission’s decision suspending his license as a result of failure to obtain continuing education.²¹ The trial court reversed the Real Estate Commission’s decision, finding it had inconsistently applied the sanction and its decision was arbitrary, but the court of appeals reversed.²²

Indiana Code section 25-1-11-16 specifically requires the Real Estate Commission to seek consistency in the application of sanctions against brokers.²³ It also requires the Commission to explain “[s]ignificant departures from prior decisions involving similar conduct.”²⁴

The resolution of the case revolved around discussion of several other disciplinary case proceedings. The trial court found that the facts in *Martin* were similar to another case, *State v. Jordan*²⁵ where a less severe sanction was imposed by the Commission.²⁶ However, the court of appeals distinguished the two cases because in *Jordan*, the Commission had specifically made a finding that it “believe[d] the explanation Jordan had offered.”²⁷ In *Martin*, the Commission made no such finding, but the trial court stated, “there is nothing in the record that would reveal that [Martin’s] continuing education transgression . . . was anything but a simple mistake.”²⁸ This statement led the court of appeals to believe that the trial court had impermissibly re-weighed the evidence, “specifically witness testimony.”²⁹

The court of appeals flatly rejected an argument that agency action was

Cummings, 387 N.E.2d 491, 495-96 (Ind. App. 1979)).

17. *Id.* at 1206-07 (citing *Chesser v. City of Hammond*, 725 N.E.2d 926, 930 (Ind. Ct. App. 2000)).

18. *Id.* at 1208.

19. *Id.* at 1207.

20. 836 N.E.2d 311 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1001 (Ind. 2006).

21. *Id.* at 312.

22. *Id.* at 312-13.

23. *Id.* at 314.

24. *Id.* (quoting IND. CODE § 25-1-11-16 (2004)).

25. Cause No. IREC 02-32.

26. *Martin*, 836 N.E.2d at 315-17.

27. *Id.* at 317.

28. *Id.*

29. *Id.*

arbitrary and capricious in *Evansville Outdoor Advertising, Inc. v. Princeton (City) Plan Commission*.³⁰ The challenger of the agency action argued that the Plan Commission's decision was arbitrary and capricious because it was "not related to the public health, safety, morals or general welfare of the community."³¹ In rejecting the argument, the court stated "[a] rule or decision will be found to be arbitrary and capricious 'only where it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion.'" ³²

2. *Issues of Statutory Interpretation*.—Agency interpretation of particular statutes is often challenged on judicial review as being erroneous, or not in accordance with the law. *Will's Far-Go Coach Sales v. Nusbaum*³³ presented such a case.

Will's Far-Go Coach Sales ("Will's Far-Go"), was a taxpayer who sold recreational vehicles ("RVs") in Fountain County.³⁴ The company frequently bought RVs from a manufacturer in Elkhart county. On March 1, the assessment date for personal property tax, Will's Far-Go had purchased several RVs, but they had not been transported to its premises.³⁵ The taxpayer paid personal property tax for the RVs in Fountain county, the county in which the taxpayer was located.³⁶ Elkhart county claimed that the taxpayer should have paid taxes for the RVs in its county and sent notices of assessment to Will's Far-Go.³⁷

The taxpayer filed two Petitions for Correction of Error (Forms 133) with the Elkhart County Property Tax Assessment Board of Appeals ("PTABOA"), but Will's Far-Go did not file claims for refund in conjunction with the Forms 133.³⁸ "[T]he PTABOA denied [Will's Far-Go's] request for relief."³⁹

Will's Far-Go appealed to the Indiana Board of Tax Review.⁴⁰ The Tax Board denied the appeal on several grounds, including that "Will's Far-Go's Forms 133 were not timely filed."⁴¹ Will's Far-Go appealed to the tax court.⁴²

The dispositive issue to the court of appeals was the time limit for filing a

30. 849 N.E.2d 630 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

31. *Id.* at 635.

32. *Id.* at 635-36 (quoting *Evansville Outdoor Adver., Inc. v. Bd. of Zoning Appeals of Evansville & Vanderburgh County*, 757 N.E.2d 151, 161 (Ind. Ct. App. 2001)).

33. 847 N.E.2d 1074 (Ind. Tax Ct. 2006).

34. *Id.* at 1075.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1076.

42. *Id.* Judicial review of decisions from the tax board has the same standard of judicial review as AOPA but has a separate statutory enactment at Indiana Code sections 33-26-6-6(e)(1)-(5).

Form 133. The court of appeals found that Indiana Code section 6-1.1-15-12, the statute providing for filing Form 133s, did not specify a time period in which the form must be filed.⁴³ It also found that the administrative regulation interpreting the statute was ambiguous.⁴⁴

In resolving the ambiguity, the court looked to common law for guidance.⁴⁵ The court noted a 2005 Indiana Supreme Court decision which held that a Form 133 was due within three years from the date the taxes were first due.⁴⁶

The court found it would be appropriate for it to construe the statute because the statute was subject to more than one interpretation.⁴⁷ The court applied the same rules of construction to administrative regulations as it applied to statutes.⁴⁸ The court also stated that the rules of construction required it “to give effect to the intent of the enacting administrative agency.”⁴⁹ Finally, the court was guided by the presumption that the administrative agency intends for its regulations to be logical and avoid an unjust or absurd result.⁵⁰

It was this later provision which guided the court. If the court adopted Will’s Far-Go’s argument a taxpayer who actually paid his taxes would only have three years to file a Form 133, but a taxpayer who had not paid its taxes would have an infinite amount of time to file a Form 133.⁵¹ The court stated this result would “penalize taxpayers for paying their taxes.”⁵²

Despite many equities being in Will’s Far-Go’s favor, it lost its appeal. It had paid the taxes, just in the wrong county. The court of appeals agreed that the statute and regulation were ambiguous. The court did not address the merits of Will’s Far-Go’s argument, but it appeared the taxpayer had a very good argument that it had paid the taxes in the proper county.⁵³ The court of appeals stated it sympathized with Will’s Far-Go that it may have to pay taxes twice; however, it

43. *Id.* at 1077.

44. *Id.*

45. *Id.* at 1077-78 (citing *Chrysler Fin. Co. v. Ind. Dep’t of State Revenue*, 761 N.E.2d 909, 912 (Ind. Tax Ct. 2002) (“[C]ourts presume that the Indiana Legislature understands and acquiesces in the common law of assignment absent a clear expression of contrary intent.”)).

46. *Id.* at 1078 (citing *Lake County Prop. Tax Assessment Bd. of Appeals v. BP Amoco Corp.*, 820 N.E.2d 1231, 1232-33 (Ind. 2005)).

47. *Id.* (citing *Gundersen v. Ind. Dep’t of State Revenue*, 831 N.E.2d 1274, 1276 (Ind. Tax Ct. 2005); *Harlan Sprague Dawley, Inc. v. Ind. Dep’t of State Revenue*, 605 N.E.2d 1222, 1229 (Ind. Tax Ct. 1992)).

48. *Id.* (citing *Harlan*, 605 N.E.2d at 1229).

49. *Id.* (citing *Gundersen*, 831 N.E.2d at 1276).

50. *Id.* (citing *Chavis v. Patton*, 683 N.E.2d 253, 257 (Ind. Ct. App. 1997)).

51. *Id.*

52. *Id.*

53. *See id.* at 1077 n.4 (“Personal property that is owned by a resident of Indiana ‘shall be assessed at the place where the owner resides on the assessment date of the year for which the assessment is made.’”). IND. CODE. § 6-1.1-3-1(a) (2006). Personal property is only assessed at the place where it is situated on the assessment date if it is “regularly used or permanently located where it is situated[.]” *Id.* § 6-1.1-3-1(c)(1).

faulted Will's Far-Go for ignoring the Elkhart County tax assessments.⁵⁴ The court noted that "Will's Far-Go had ample notice and time to challenge the assessments."⁵⁵

Hoosier Outdoor Advertising Corp. v. RBL Management, Inc. ("Hoosier"),⁵⁶ also dealt with agency interpretation of relevant law, this time a zoning ordinance. Two billboard companies who each claimed to have rights to erect billboards in the same county disputed decisions from a County Board of Zoning Appeals ("BZA").⁵⁷

The court recited the black letter law provisions that questions of law decided by an agency are generally reviewed *de novo*;⁵⁸ "however[,] an agency's construction of its own ordinance is entitled to deference."⁵⁹ When the ordinance has two reasonable interpretations, "one if which is supplied by [the] administrative agency charged with enforcing the ordinance, the court terminates its analysis and does not consider the reasonableness of the other party's interpretation."⁶⁰ The court employed that specific principle in resolving the issues in the case.

The appellee (who had received an unfavorable ruling from the BZA, but then prevailed in reversing that decision at the trial court) raised several arguments that the BZA's construction of the local zoning ordinance was incorrect.⁶¹ However, with regard to each of the appellee's arguments, the court found that the BZA's construction of the local ordinance was reasonable.⁶²

Indiana Department of Environmental Management v. Lake County Solid Waste Management District ("IDEM v. Lake County")⁶³ relied in part on *Hoosier* in reaching its result that an administrative agency's interpretation of a statute was reasonable. The case also illustrates what can happen when there is a struggle for authority between state and local authority.

In *IDEM v. Lake County*, the Lake County Solid Waste Management District ("District") challenged the Indiana Department of Environmental Management's ("IDEM") approval of a permit for solid waste processing of medical waste for Midwest Medical Solutions, LLC ("Midwest") before the District had made a determination of need for such a permit.⁶⁴

After first writing to the executive director of the District in March 2001 to

54. *Nusbaum*, 847 N.E.2d at 1078 n.5.

55. *Id.*

56. 844 N.E.2d 157 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 590 (Ind. 2006).

57. *Id.* at 160-61.

58. *Id.* at 163 (citing *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 809 (Ind. 2004)).

59. *Id.* (citing *Story Bed & Breakfast, LLP v. Brown County Area Plan Comm'n*, 819 N.E.2d 55, 66 (Ind. 2004)).

60. *Id.* (citing *Shaffer v. State*, 795 N.E.2d 1072, 1076-77 (Ind. Ct. App. 2003)).

61. *Id.* at 170.

62. *Id.* at 164, 167-69.

63. 847 N.E.2d 974 (Ind. Ct. App. 2006), *trans. denied*, (Ind. Feb. 1, 2007).

64. *Id.* at 976-82.

ask if the District would support Midwest's application, Midwest applied to IDEM for a permit in October 2001.⁶⁵ After two years to work through various issues, IDEM held a public comment period in early 2004, during which interested parties could "make written [or] oral technical comments regarding changes and additions to Midwest's permit application."⁶⁶ The District wrote to IDEM and stated it wanted "to become active and involved in making a needs determination for medical waste processing facilities within the District" and requested that IDEM "suspend any current or future applications for a medical waste processing facility" in the county until after the District had made its determination.⁶⁷ IDEM did not suspend its consideration of Midwest's permit and instead, issued a permit on May 7, 2004.⁶⁸

The District sought administrative review of the issuance of the permit with the Office of Environmental Adjudication ("OEA").⁶⁹ The OEA upheld the issuance of the permit.⁷⁰ "The District petitioned for review of the OEA decision in the Lake Superior Court" and argued that IDEM must wait on the District's determination of need for a waste processing facility.⁷¹ The superior court agreed with the District and reversed the OEA's decision.⁷² The superior court faulted Midwest for not pursuing a determination of need from the District before instituting the permit process with IDEM.⁷³

Although questions of law are reviewed *de novo*,⁷⁴ if a statute or "ordinance is subject to different interpretations, the interpretation chosen by the administrative agency charged with the duty of enforcing the ordinance is entitled to great weight, unless that interpretation is inconsistent with the ordinance itself."⁷⁵ All that is required under this analysis is a showing that the administrative agency's interpretation is reasonable.⁷⁶ The court of appeals also mentioned that the fact that the trial court adopted the District's proposed order verbatim with only minor formatting changes weakened its confidence that the trial court's findings were the result of considered judgment.⁷⁷

The District argued that the legislature designated the District as the

65. *Id.* at 977.

66. *Id.* at 978.

67. *Id.*

68. *Id.* at 979.

69. *Id.*

70. *Id.*

71. *Id.* at 980-81.

72. *Id.* at 982.

73. *Id.*

74. *Id.* at 983 (quoting *Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 163 (Ind. Ct. App. 2006)).

75. *Id.* (citing *Kiel Bros. Oil Co. v. Ind. Dep't of Env'tl. Mgmt.*, 819 N.E.2d 892, 902 (Ind. Ct. App. 2004)).

76. *Id.* (citing *Hoosier*, 844 N.E.2d at 163).

77. *Id.* (citing *Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 993 n.6 (Ind. Ct. App. 2005)).

appropriate agency to determine solid waste needs within a waste district.⁷⁸ As evidence of that intent, the District was required to make a solid waste management plan, which had been approved by IDEM.⁷⁹ The court of appeals noted several statutes which generally supported this view.⁸⁰ Although the court also noted that Indiana Code section 13-20-1-2 stated applicants for a permit must demonstrate a *local or regional* need for the facility.⁸¹

The court noted its research had revealed no case law that adequately explained the relationship between the local and state authorities under the particular statutes relevant to this case.⁸² It reviewed several cases under somewhat similar scenarios and concluded that solid waste districts “play a vital role in addressing, regulating and generally ‘dealing with’ solid waste management issues.”⁸³ However, the districts do not “operate in a vacuum” but rather, operate as “part of the overall state system.”⁸⁴

The court of appeals noted that a plain reading of the statutes and regulations that govern the permitting process did not contain a requirement that “IDEM either solicit a district’s local determination of need or suspect review of an application upon a district’s request to perform” its own needs study.⁸⁵ The court also thought it was advantageous to vest IDEM with ultimate statewide permitting authority because it would enhance consistent application of criteria.⁸⁶

The court of appeals responded to the concern that its interpretation might render a district’s voice in the permitting process meaningless.⁸⁷ The court stated that districts may play an advisory role if they choose.⁸⁸ The court also noted that districts had many other duties and powers.⁸⁹ Although not figuring prominently in the court of appeals’ decision, based on arguments the parties had raised, the court did express that the trial court had “usurped IDEM’s power by reweighing evidence.”⁹⁰ The court also agreed with the OEA that the District waived the issue of whether Midwest demonstrated a local or regional need for the facility

78. *Id.* at 984.

79. *Id.*

80. *Id.* at 984-86.

81. *Id.* at 985 (emphasis in original).

82. *Id.* at 986.

83. *Id.* at 987 (citing *Bd. of Comm’rs of LaPorte County v. Town & Country Utils., Inc.*, 791 N.E.2d 249, 257 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 800 (2004)).

84. *Id.* (citing *Town & Country Utils.*, 791 N.E.2d at 257).

85. *Id.* at 988 (referring to *Carter-McMahon v. McMahon*, 815 N.E.2d 170, 175 (Ind. Ct. App. 2004) for the proposition “in construing a rule, it is just as important to recognize what it does not say as it is to recognize what it does say.”).

86. *Id.* at 989.

87. *Id.* at 988-89.

88. *Id.* In this case the court noted that the District had not opposed the permit.

89. *Id.* at 989-90.

90. *Id.* at 991 (referring to *Ind. Dep’t of Env’tl. Mgmt. v. Boone County Res. Recovers Sys. Inc.*, 803 N.E.2d 261, 273 (Ind. Ct. App. 2004)).

by failing to raise the issue earlier.⁹¹

Finally, *City of Fort Wayne v. Utility Center, Inc.*⁹² is notable for its resolution of a statutory interpretation issue in a decision from the IURC, which is not governed by AOPA. Judicial review of decisions from the IURC follows a two-tiered standard of review.⁹³ “First, the court determines whether the decision is supported by specific findings of fact and by sufficient evidence,” then the “court determines whether the Commission’s decision is contrary to law.”⁹⁴

The court of appeals rejected Fort Wayne’s claim that the IURC had used a hypothetical purchase price to determine the amount of the acquisition adjustment, finding that the IURC had not used a “hypothetical” number.⁹⁵ The court also rejected the city’s argument that the IURC had included intangible property, which was contrary to the specific terms of Indiana Code section 8-1-2-6(b). The IURC had made a specific finding that there was a shortage of evidence proving that the purchase price included good will.⁹⁶ The court of appeals noted this lack of evidence and concluded that it could not say that the IURC abused its discretion in calculating the acquisition adjustment.⁹⁷

3. *Substantial Evidence*.—Appeals based on lack of substantial evidence may be the toughest grounds to prevail upon, but *Rice v. Allen County Plan Commission*,⁹⁸ shows it is possible. In *Rice*, a county plan commission approved a development plan to construct a house but denied approval for a detached garage, which had already been constructed.⁹⁹ The decision was initially upheld on judicial review, but the court of appeals reversed.¹⁰⁰

In addition to referring to the AOPA standard of review, the court noted with regard to zoning proceedings, “evidence is substantial ‘if it is ore than a scintilla and less than a preponderance.’”¹⁰¹ The court also stated the party asserting invalidity must establish as a matter of law that each criterion for approval of a

91. *Id.* (citing *Save the Valley, Inc. v. Ind.-Ky. Elec. Corp.*, 820 N.E.2d 677, 679 n.3 (Ind. Ct. App.), *reh’g granted on other grounds*, 824 N.E.2d 776 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005); and *Turner v. Stuck*, 778 N.E.2d 429, 432 (Ind. Ct. App. 2002)).

92. 840 N.E.2d 836 (Ind. Ct. App. 2006).

93. *Id.* at 839 (citing *U.S. Gypsum v. Ind. Gas Co.*, 735 N.E.2d 790, 795 (Ind. 2000)). Appeals from the IURC are heard directly by the court of appeals. IND. APP. R. 2A, 5C.

94. *Id.* (citing *Hancock County Rural Elec. Membership Corp. v. City of Greenfield*, 768 N.E.2d 909, 911 (Ind. Ct. App. 2002)).

95. *Id.* at 841.

96. *Id.*

97. *Id.*

98. 852 N.E.2d 591 (Ind. Ct. App. 2006), *trans. denied*, 2007 Ind. LEXIS 34 (Ind. Jan. 3, 2007).

99. *Id.* at 593.

100. *Id.*

101. *Id.* at 597 (citing *S & S Enters., Inc. v. Marion County Bd. of Zoning Appeals*, 788 N.E.2d 485, 491 (Ind. Ct. App. 2003)).

zoning application has been fulfilled¹⁰²—a standard that the concurrence thought settled the case.¹⁰³

The court of appeals reviewed each of the plan commission's three reasons for denying the development plan and found there was lack of substantial evidence on each matter. Despite the fairly low standard to find substantial evidence, the court of appeals found it was improper to rely on some of the proffered evidence because of layperson observations by residents "who were opposed to the construction"¹⁰⁴ all along, assumptions which were not supported by the evidence, and review of an appraisal that the Commission relied upon to say that property values had declined.¹⁰⁵

Evansville Outdoor Advertising, discussed *supra*, shows a more typical result of a challenge based on lack of substantial evidence.¹⁰⁶ EOA argued that the testimony of an adjacent property owner did not provide substantial evidence, because it was not supported by exhibits or photographs.¹⁰⁷ The court rejected this argument indicating that it was a request to reweigh the evidence.¹⁰⁸

4. *Limitation to the Agency Record*.—Two cases during the survey period illustrated that judicial review is limited to the evidence of record. In *Bucko Construction Co. v. Indiana Dept. of Transportation*, the Indiana Department of Transportation ("INDOT") had contracted with Bucko Construction ("Bucko") to repave certain portions of highway and conduct bridge reconstruction.¹⁰⁹ During the course of that work, INDOT reviewed Bucko's performance and reduced Bucko's prequalification rating for highway construction projects by thirty percent.¹¹⁰ Bucko sought judicial review of INDOT's administrative decision.¹¹¹

While the judicial review was pending in Lake County Superior Court, breach of contract proceedings were conducted in Marion County.¹¹² Bucko sought to supplement the record in the judicial review proceeding with the Marion County judgment; however, the Lake County court refused to consider

102. *Id.* (citing *Town of Beverly Shores v. Bagnall*, 590 N.E.2d 1059, 1061 (Ind. 1992)).

103. *Id.* at 604 (Sullivan, J., concurring).

104. *Id.* at 599.

105. *Id.* at 599, 600, 603.

106. *Evansville Outdoor Adver., Inc. v. Princeton (City) Planning Comm'n*, 849 N.E.2d 630, 635 (Ind. Ct. App. 2006), *trans. denied*, 2006 Ind. LEXIS 961 (Ind. 2006); *see also supra* notes 30-32 and accompanying text.

107. *Evansville Outdoor Adver.*, 849 N.E.2d at 635.

108. *Id.* "Courts that review administrative determinations, at both the trial and appellate level, are prohibited from reweighing the evidence or judging the credibility of witnesses and must accept the facts as found by the administrative body." *Evansville Outdoor Adver., Inc. v. Bd. of Zoning Appeals of Evansville & Vanderburgh County*, 757 N.E.2d 151, 158 (Ind. Ct. App. 2001).

109. 850 N.E.2d 1008, 1010 (Ind. Ct. App. 2006).

110. *Id.*

111. *Id.*

112. *Id.*

the Marion County judgment.¹¹³ On appeal Bucko claimed the “Marion County judgment was controlling and should have been considered in the judicial review action.”¹¹⁴

In review under AOPA, “[j]udicial review of disputed issues of fact must be confined to the agency record for the agency action supplemented by additional evidence taken under section 12 of this chapter. The court may not try the cause de novo or substitute its judgment for that of the agency.”¹¹⁵ The court also noted that “review of an agency’s decision must be confined to the record that was before the agency, except in limited circumstances.”¹¹⁶

The court of appeals concluded that it would not have been proper for the reviewing court to look outside the administrative record and include the Marion County judgment.¹¹⁷ The court characterized Bucko’s request as asking the judicial review court to substitute the Marion County court’s judgment for the judgment of the administrative agency.¹¹⁸

Even though the court of appeals was faced with apparently conflicting decisions from the Marion County litigation and administrative action, the court reiterated the limited scope of judicial review of administrative actions.¹¹⁹ The court went even further, however, and observed that even if the Marion County litigation had been considered, the judgment did not make a legal determination as to fault or responsibility for the problems incurred with the Bucko contract.¹²⁰

The *Werner I* opinion also addressed an issue limiting the judicial review to items in the record. The court also found that the Health Facility Board’s decision, which offered no explanation as to differences between its sanction and the ALJ’s recommendation, was not consistent with Indiana Code section 4-21.5-3-28(g), which requires the Board’s final order to “identify any differences between the final order and the nonfinal order issued by the administrative law judge.”¹²¹ The Health Facility Board argued comments one member of the Health Facility Board made during the hearing satisfied section 28(g); however, the court rejected this argument, stating AOPA requires written findings and Board member’s comments at oral argument are outside the record on which the Board must base its decision.¹²²

113. *Id.*

114. *Id.*

115. *Id.* (citing IND. CODE § 4-21.5-5-11 (2005)).

116. *Id.* at 1016 (citing *Ind. Educ. Employment Relations Bd. v. Tucker*, 676 N.E.2d 773 (Ind. Ct. App. 1997)).

117. *Id.*

118. *Id.*

119. *Id.* at 1017-18.

120. *Id.* at 1018.

121. *Ind. State Bd. of Health Facility Adm’rs v. Werner (Werner I)*, 841 N.E.2d 1196, 1208 (Ind. Ct. App.), *reh’g*, 846 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 591 (Ind. 2006) (quoting IND. CODE § 4-21.5-3-28(g) (2005)).

122. *Id.*

B. Scope of Judicial Authority

If a reviewing court finds administrative agency action has been erroneous, what can a reviewing court can do? The court of appeals found that the lower court had exceeded the scope of its judicial review authority in *Werner I* by ordering the Board to affirm the ALJ's order and impose a censure.¹²³ The court started with Indiana Code section 4-21.5-5-15 which provides:

If the court finds that a person has been prejudiced under section 14 of this chapter, the court may set aside an agency action and:

- (1) remand the case to the agency for further proceedings; or
- (2) compel agency action that has been unreasonably delayed or unlawfully withheld.¹²⁴

The court of appeals stated even though the language of the statute appears "unequivocal," a string of cases interpreting the section showed that the court has frequently limited a trial court's ability to compel agency action directly.¹²⁵

Likewise, in this case, the court of appeals found that remand, rather than compelling agency action, was the correct remedy.¹²⁶ The court considered whether it would be pointless to remand, and concluded it would not.¹²⁷ In *Werner's* case, the court indicated a variety of sanctions were available to the Health Facility Board and the record did not clearly require the imposition of a specific sanction against *Werner*.¹²⁸ For instance, the Health Facility Board could enter findings that would support its decision to impose a more severe sanction than what the ALJ recommended.¹²⁹

A novel separation of powers argument was presented to the court with regard to its abilities to intervene in agency action in *Planned Parenthood of Indiana v. Carter*.¹³⁰ The case arose when the reproductive health services clinic sought injunctive relief in court, rather than judicial review, but is included in this section to the extent it addresses the ability of the courts to intervene with regard to agency actions.

When the Indiana Medicaid Fraud Control Unit demanded unlimited access to minor patients' medical records, Planned Parenthood sought an injunction against the agency.¹³¹ One of the trial court's bases for denying the preliminary injunction was separation of powers, stating an injunction "would so excessively

123. *Id.* at 1210.

124. *Id.* at 1209.

125. *Id.*

126. *Id.* at 1210.

127. *Id.* at 1209.

128. *Id.* at 1210.

129. *Id.*

130. 854 N.E.2d 853 (Ind. App. 2006). The case appeared headed to the Indiana Supreme Court, but the parties reached a settlement. See Diane Penner, *State Ends Battle for Girls' Health Records*, INDIANAPOLIS STAR, Dec. 1, 2006, at 1.

131. *Carter*, 854 N.E.2d at 856.

involve the Court in the judgments of executive investigatory authority as to threaten a separation of powers violation.”¹³² The court of appeals found the trial court’s conclusion to be erroneous.¹³³ Noting “[i]t is elementary that the authority of the State to engage in administrative action is limited to that which is granted it by statute,”¹³⁴ the court agreed with Planned Parenthood that the trial court had authority to enjoin acts of the administrative agency that went beyond the agency’s statutory boundaries.¹³⁵ “To maintain the proper balance between the departments of government, the courts have power to confine administrative agencies to their lawful jurisdictions.”¹³⁶

C. Subject Matter Jurisdiction—Exhaustion of Remedies

Exhaustion of remedies is a powerful doctrine and frequently appears in administrative law cases. In Indiana, failure to exhaust administrative remedies deprives the court of subject matter jurisdiction, rendering the trial court’s judgment void.¹³⁷ Furthermore, lack of subject matter jurisdiction may be raised at any time, and courts are required to consider the issue *sua sponte* if it is not properly raised by the party challenging jurisdiction.¹³⁸ “The reasons for requiring the exhaustion of administrative remedies are well established: (1) premature litigation may be avoided; (2) an adequate record for judicial review may be compiled; and (3) agencies retain the opportunity and autonomy to correct their own errors.”¹³⁹

The doctrine of administrative remedies was used to dismiss *Hecht v. State*.¹⁴⁰ In *Hecht*, the court of appeals found that a taxpayer, who was bringing a class action lawsuit for damages against the Bureau of Motor Vehicles (“BMV”) for the wrongful collection of excess license excise tax and for wrongful denial of refunds of excess tax, had failed to exhaust his administrative

132. *Id.* at 862.

133. *Id.* at 865.

134. *Id.* at 864 (citing *Ind. State Bd. of Public Welfare v. Tioga Pines Living Ctr., Inc.*, 622 N.E.2d 935, 939 (Ind. 1993)).

135. *Id.*

136. *Id.* (citing *Wilmont v. City of South Bend*, 48 N.E.2d 649, 650 (Ind. 1943)). The court of appeals found that the minor patients had a right of privacy in their medical records. It appears a significant element of the court’s decision was that Indiana Medicaid Fraud Control Unit had less intrusive means of obtaining information regarding whether Planned Parenthood’s minor patients were the victims of child abuse and neglect that the organization had failed to report. *Id.* at 883.

137. *City of E. Chicago v. Copeland*, 839 N.E.2d 737, 742 (Ind. Ct. App. 2005) (citing *City of Marion v. Howard*, 832 N.E.2d 528, 531 (Ind. Ct. App. 2005)).

138. *Id.* (citing *Stewart v. Kingsley Terrace Church of Christ, Inc.*, 767 N.E.2d 542, 544 (Ind. Ct. App. 2002)).

139. *Id.* (citing *Sun Life Assurance Co. of Can. v. Ind. Comprehensive Health Ins. Ass’n*, 827 N.E.2d 1206, 1209 (Ind. Ct. App. 2005)).

140. 853 N.E.2d 1007 (Ind. Ct. App. 2006).

remedies.¹⁴¹

Indiana law provides that vehicles must be registered with the BMV annually, and the owner of a vehicle must pay an annual license excise tax on or before the regular annual registration date in each year.¹⁴² In 2000, the BMV began splitting registration dates to expire either in the middle or the end of the month based on the last name of the vehicle's owner.¹⁴³ Hecht was a taxpayer who was required to renew his registration by the fifteenth of the month, rather than the end of the month.¹⁴⁴ Hecht alleged that the BMV's practice separated taxpayers into two different classes, which violated the equal privileges, special laws, and equal taxation clauses of the Indiana constitution and the equal protection clause of the U.S. constitution.¹⁴⁵

The court of appeals' conclusion that Hecht had failed to exhaust his administrative remedies turned on its construction of Indiana Code sections 6-8.1-9-1 and 6-6-5-7.7. The court observed that Hecht had followed the procedure to obtain a refund of excise tax under Indiana Code section 6-6-5-7.7; however, it determined in this case, the proper procedure for seeking a refund was governed by Indiana Code section 6-8.1-9-1.¹⁴⁶ Because Hecht had failed to follow the correct procedure, the trial court was deprived of subject matter jurisdiction over his complaint.¹⁴⁷

Exhaustion of remedies claims failed in *Rhines v. Norlarco Credit Union*¹⁴⁸ and *Indianapolis-Marion County Public Library v. Shook, LLC*.¹⁴⁹ In *Rhines*, the court of appeals summarily rejected a debtor's claim that his creditor failed to exhaust administrative remedies under the Fair Debt Collections Practices Act ("FDCPA").¹⁵⁰ The court indicated that the FDCPA is for the protection of consumers and does not provide an administrative remedy to debt collectors.¹⁵¹

In *Shook*, the court of appeals ruled that a contractual provision between the library and its general contractor did not create an obligation to exhaust administrative remedies.¹⁵² The contract required the contractor to submit claims to the library's construction manager, who then had thirty days to approve or deny the claim or request additional information.¹⁵³ The provision also indicated that complying with the provision was a condition precedent to initiating any

141. *Id.*

142. *Id.* at 1009 (citing IND. CODE § 6-6-5-6 (2006)).

143. *Id.*

144. *Id.*

145. *Id.* at 1009-10.

146. *Id.* at 1012-13.

147. *Id.* at 1013 (citing *City of Marion v. Howard*, 832 N.E.2d 528, 531 (Ind. Ct. App. 2005)).

148. 847 N.E.2d 233 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 595 (Ind. 2006).

149. 835 N.E.2d 535 (Ind. Ct. App. 2005).

150. *Rhines*, 847 N.E.2d at 236-37.

151. *Id.* at 237.

152. *Shook*, 835 N.E.2d at 539-40.

153. *Id.* at 536.

court or arbitration proceeding.¹⁵⁴

These provisions did not create an obligation to exhaust administrative remedies, however.¹⁵⁵ The court reasoned that the library did not act in the capacity of an administrative agency responding to questions within the scope of its statutory competence when it received and acted on the general contractor's claims.¹⁵⁶ The court also noted that the claims submission process established by the contract was not statutorily based.¹⁵⁷ The court noticed that the only "non-statutory or non-administrative agency context in which the exhaustion doctrine has been found to apply involved the rules of a private association that had established a remedial procedure."¹⁵⁸

1. *Exceptions to the Exhaustion of Remedies Requirement.*—A challenger who has failed to exhaust administrative remedies may be spared if he falls into an exception to the requirement. *City of East Chicago v. Copeland* illustrates the futility exception.¹⁵⁹ In *East Chicago*, nine city firefighters sued the city for denying them the vacation time required by city ordinance.¹⁶⁰ The trial court granted summary judgment in favor of the firefighters and assessed damages and attorney fees.¹⁶¹ On appeal, the city alleged that the trial court lacked subject matter jurisdiction because the firefighters had not exhausted their administrative remedies.¹⁶²

The court of appeals first observed that it was not clear that the relatively short periods the firefighters had for administrative review were applicable to a situation where vacation time had been denied to an employee over a period of several years.¹⁶³ But the court went on to conclude that one of the firefighters had exhausted his administrative remedies and that it would have been futile for the others to have sought to exhaust their administrative remedies.¹⁶⁴ Furthermore, because one of the firefighters had exhausted administrative remedies, the court concluded that administrative resolution prior to resorting to the courts had been sought and a record had been created, both reasons for requiring exhaustion of remedies.¹⁶⁵

The court also recognized an exception to the exhaustion requirement where "administrative remedies had been exhausted on the same or closely related

154. *Id.*

155. *Id.* at 539-40.

156. *Id.* at 539.

157. *Id.*

158. *Id.* at 538 (citing *M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass'n*, 809 N.E.2d 834, 840 (Ind. 2004)).

159. 839 N.E.2d 737 (Ind. Ct. App. 2005).

160. *Id.* at 739.

161. *Id.* at 741-42.

162. *Id.* at 742.

163. *Id.* at 743.

164. *Id.* at 743-44.

165. *Id.* at 744.

issues.”¹⁶⁶ The court concluded that the firefighters had either met or been exempted from the requirement to exhaust administrative remedies.¹⁶⁷

In *Title Services, LLC v. Womacks*, a title insurance agency sued the Marion County Auditor for damages due to negligent performance of ministerial duties, when the office failed to process or lost properly filed homestead exemptions and mortgage deductions.¹⁶⁸ As a result the title insurance agency’s clients overpaid taxes because they did not receive homestead exemptions or mortgage deductions they were entitled to.¹⁶⁹

The court of appeals found that the title insurance agency had failed to exhaust its administrative remedies. The title insurance agency argued that its complaint was a tort action, which would be exempt from the exhaustion of remedies requirement.¹⁷⁰ However, the court of appeals relied on past precedent which held all taxpayer challenges to property tax assessments, regardless of the reason for the challenge, are to be decided by the tax court after the taxpayer has appealed to the local board and the tax board.¹⁷¹

The court found that the taxpayer should have followed the procedure set forth in Indiana Code section 6-1.1-15 for review and appeal of property tax assessment and correction of errors, and that the section required exhaustion of remedies.¹⁷² The title insurance agency had not followed the procedures available to it under Indiana Code section 6-1.1-15 and therefore, the court found that the agency’s complaint should be dismissed for failure to exhaust administrative remedies.¹⁷³

The title insurance agency claimed that it fell into an exception to the exhaustion rule that it had no adequate administrative remedies to exhaust.¹⁷⁴ Because there was no “public record” that the title insurance agency had attempted to file the exemptions, the title insurance agency argued that the local tax board might conclude that it lacked power to review the Auditor’s negligent loss of applications.¹⁷⁵

The court of appeals rejected this argument. The court cited Indiana Code section 6-1.1-15-16 which charges the tax board to “consider all evidence relevant to the assessment of the real property regardless of whether the evidence was submitted to the township assessor before the assessment of the property.”¹⁷⁶

166. *Id.* (quoting *Smith v. State Lottery Comm’n*, 701 N.E.2d 926, 933 n.7 (Ind. Ct. App. 1998), *remanded after appeal*, 812 N.E.2d 1066 (Ind. Ct. App. 2004)).

167. *Id.*

168. 848 N.E.2d 1151, 1153 (Ind. Ct. App. 2006).

169. *Id.*

170. *Id.* at 1154 n.4.

171. *Id.* (citing *Common Council of City of Hammond v. Matonovich*, 691 N.E.2d 1326, 1330 (Ind. Ct. App.), *trans. denied*, 706 N.E.2d 166 (Ind. 1998)) (emphasis supplied).

172. *Id.* at 1156-57.

173. *Id.* at 1155-57.

174. *Id.* at 1156-57.

175. *Id.*

176. *Id.* at 1157 (quoting IND. CODE § 6-1.1-15-16 (2006), *amended by* 2007 Ind. Legis. Serv.

The court further stated that evidence the title insurance agency would have that it timely submitted applications to the Auditor appeared relevant to the question of whether the challenged assessments were correct.¹⁷⁷

2. *Primary Jurisdiction*.—The interrelationship between primary jurisdiction and exhaustion of remedies was illustrated by *M.C. Welding and Machining Co. v. Kotwa*.¹⁷⁸ In *Kotwa*, an employee brought discrimination and retaliation claims against his former employer.¹⁷⁹ After trial to a jury, where a general verdict was entered in favor of the employee, the employer challenged the trial court's jurisdiction on the grounds that the employee had failed to exhaust administrative remedies with the Indiana Civil Rights Commission.¹⁸⁰

The court of appeals applied the doctrine of primary jurisdiction to determine whether the employee was required to exhaust his administrative remedies. The doctrine of primary jurisdiction provides that “[i]f at least one of the issues involved in the case is within the jurisdiction of the trial court, the entire case falls within its jurisdiction, even if one or more of the issues are clearly matters for exclusive administrative or regulatory agency determination.”¹⁸¹ The court further cited *Austin Lakes* for the principle that the trial court “must invoke the doctrine of primary jurisdiction where one (but less than all) of the issues in the case requires exhaustion of remedies before judicial review can occur.”¹⁸²

The court determined that the Indiana Civil Rights Commission has jurisdiction over some retaliation claims, but not retaliation claims for exercising the right to apply for unemployment benefits.¹⁸³

D. Other Jurisdiction Issues

Several cases arose during the survey period regarding whether the judicial review court has jurisdiction to hear an appeal if the record is not properly filed. The Indiana Supreme Court's decision in *Wayne County Property Tax Assessment Board of Appeals v. United Ancient Order of Druids-Grove*,¹⁸⁴ may have helped to settle the issue; however, it is also possible to limit that case to its facts, and as discussed in this section, it is not necessarily dispositive with regard to all other situations.

In *Werner I*¹⁸⁵ and *Werner II*,¹⁸⁶ the Board of Health Facility Administrators

Pub. L. 219-2007 (West 2007)).

177. *Id.*

178. 845 N.E.2d 188 (Ind. Ct. App. 2006).

179. *Id.* at 191-92.

180. *Id.*

181. *Id.* at 193 (quoting *Austin Lakes Joint Venture v. Avon Util., Inc.*, 648 N.E.2d 641, 646 (Ind. 1995)).

182. *Id.* (quoting *Austin Lakes*, 648 N.E.2d at 647).

183. *Id.*

184. 847 N.E.2d 924 (Ind. 2006).

185. Ind. State Bd. of Health Facility Admr's v. *Werner* (*Werner I*), 841 N.E.2d 1196, 1208 (Ind. Ct. App.), *reh'g*, 846 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 591 (Ind. 2006).

argued that the trial court did not have subject matter jurisdiction over the case because Werner failed to timely file the record of the agency proceedings.¹⁸⁷ In *Werner I*, the court of appeals held that the Health Facility Board had waived this issue by not timely raising it with the trial court.¹⁸⁸ On rehearing the court affirmed its earlier opinion.¹⁸⁹

In *Werner I* the court of appeals started its analysis by referring to a number of cases cited in favor of the contention that the trial court did not have jurisdiction.¹⁹⁰ However, the court distinguished the cases because they did not involve instances where the party challenging the judicial review had failed to raise the issue of jurisdiction with the judicial review court itself.¹⁹¹ Because the Health Facility Board had not raised the issue below, Werner argued it had waived the issue.¹⁹²

The court debated whether failing to comply with the time provisions of Indiana Code section 4-21.5-5-13 deprived the trial court of subject matter jurisdiction, which can be raised at any time, or was a challenge to the existence of jurisdiction, sometimes called jurisdiction of the parties or the particular cause, which could be waived if not raised at the time.¹⁹³ Ultimately, the court concluded that failure to timely file the record affected the trial court's jurisdiction over the case, and the board had waived its right to raise the argument.¹⁹⁴

On rehearing, the Health Facility Board argued that there was no principled reason to distinguish the timely filing of an agency record from the exhaustion of administrative remedies.¹⁹⁵ The court of appeals rejected this argument. The court noted that the exhaustion of remedies requirement serves the purposes of avoiding premature litigation, ensuring an adequate record for judicial review is compiled and giving agencies the opportunity to correct their own errors.¹⁹⁶ The

Werner I is also discussed *supra* notes 30-32 and accompanying text.

186. Ind. State Bd. of Health Facility Adm'rs v. Werner (*Werner II*), 846 N.E.2d 669 (Ind. Ct. App.), *trans. denied* 860 N.E.2d 591 (Ind. 2006).

187. *Werner I*, 841 N.E.2d at 1204.

188. *Id.* at 1206.

189. *Werner II*, 846 N.E.2d at 670.

190. *Werner I*, 841 N.E.2d at 1204 (citing *Clendening v. Ind. Family & Soc. Servs. Admin.*, 715 N.E.2d 903, 904 (Ind. Ct. App. 1999); *Park v. Med. Licensing Bd.*, 656 N.E.2d 1176, 1178 (Ind. Ct. App. 1995); *Indianapolis Yellow Cab, Inc. v. Ind. Civil Rights Comm'n*, 570 N.E.2d 940, 942 (Ind. Ct. App. 1991); *Seattle Painting Co. v. Comm'r of Labor*, 661 N.E.2d 596, 597 (Ind. Ct. App. 1996)).

191. *Id.*

192. *Id.*

193. *Id.* at 1205. The Indiana Supreme Court decision in *Kozlowski v. Dordieski*, 849 N.E.2d 535, 537 n.1 (Ind. 2006) cites *Werner I* with some criticism over its jurisdiction terminology.

194. *Werner I*, 841 N.E.2d at 1206.

195. *Werner II*, 846 N.E.2d at 672.

196. *Id.* at 673 (citing *Ind. Dep't of Env'tl. Mgmt. v. Twin Eagle, LLC*, 798 N.E.2d 839, 844 (Ind. 2003)).

court found that the requirement to timely file an administrative record was different and did not advance the same goals.¹⁹⁷

The Indiana Supreme Court weighed in on a related issue in *Wayne County Property Tax Assessment Board of Appeals v. United Ancient Order of Druids-Grove*,¹⁹⁸ a case which arose after *Werner I and II*. *Wayne County* addressed an apparent conflict between AOPA (Indiana Code section 4-21.5-5-13) and Tax Court Rule 3, which specifies the timeframe appellants have to file the record for an appeal to the tax court.¹⁹⁹

Indiana Code section 4-21.5-5-13 provides that “within thirty (30) days after filing the petition [for judicial review], or within further time allowed by the court or by other law, the petitioner shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action.”²⁰⁰ However, Tax Court Rule 3(E) provides “[t]he petitioner shall transmit a certified copy of the record to the Tax Court within thirty days after having received notification that the record has been prepared by the Indiana Board of Tax Review [“IBTR”].”²⁰¹ In *Wayne County*, the taxpayer had not filed the record within the thirty days after filing the petition as required by Indiana Code section 4-21.5-5-13, but had filed the record within thirty days after having received notification that the record had been prepared under Tax Court Rule 3(E).²⁰²

The Indiana Supreme Court found that Indiana Code section 4-21.5-5-13 and Tax Court Rule 3(E) did not conflict with each other. The court interpreted the AOPA provision for “further time allowed by the court” to include court rules, and held that a filing in compliance with Rule 3(E) is timely and confers Tax Court jurisdiction over the appeal.²⁰³ The court rejected an argument that the court rules were “other law” under Indiana Code section 4-21.5-5-13.²⁰⁴

The court noted that the common purpose of both the AOPA provision and Tax Court Rule 3(E) is to ensure efficient, speedy appeals and to ensure that the Tax Court has access to the record before rendering its decision.²⁰⁵ The court also noted that it may frequently be impossible for the IBTR to prepare a certified record within thirty days of the filing of a petition, because tax assessments are made at the same general times and can trigger a large volume of concurrent appeals.²⁰⁶ The court recognized that by the Tax Court creating a rule to deal with this situation, requiring the record to be filed within thirty days after completion avoided unnecessary work for the Tax Court and unneeded expenses

197. *Id.*

198. 847 N.E.2d 924 (Ind. 2006).

199. *Id.* at 925.

200. *Id.* at 926-27 (quoting IND. CODE § 4-21.5-5-13 (2005)).

201. *Id.* at 926 (quoting IND. TAX R. 3(E)).

202. *Id.*

203. *Id.* at 928-29.

204. *Id.* at 928.

205. *Id.*

206. *Id.*

for the parties in requesting extensions of time.²⁰⁷

The court stated that “[t]he timing of filing the agency record implicates neither the subject matter jurisdiction of the Tax Court nor personal jurisdiction over the parties. Rather, it is jurisdictional only in the sense that it is a statutory prerequisite to the docketing of an appeal in the Tax Court.”²⁰⁸

After *Wayne County* was decided, a related issue arose in *Izaak Walton League of America, Inc. v. DeKalb County Surveyor’s Office*.²⁰⁹ In *Izaak*, conservation groups challenged a permit issued by the Department of Natural Resources (“DNR”) to remove two logjams from a creek.²¹⁰ The conservation groups sought administrative review from the Natural Resources Commission and then judicial review from the trial court.²¹¹ The trial court, on its own motion, determined that it did not have jurisdiction because the conservation groups had failed to file a complete agency record.²¹² In a two to one decision by the court of appeals, the court held that the conservation groups had filed a sufficient record to confer jurisdiction on the trial court, even though there were two items that arguably should have been included in record but were not included with the initial filing.²¹³

The court of appeals first dealt with an argument, as in the *Werner* opinions, that failure to file the record divested the trial court of subject matter jurisdiction.²¹⁴ The court of appeals affirmed its holding in the *Werner* opinions and, for this case, also relied in part on the supreme court’s decision in *Wayne County* to conclude that filing the agency record affected the trial court’s jurisdiction over a particular case, not subject matter jurisdiction.²¹⁵

When the conservation groups requested preparation of the agency record, they requested that the record include specific things, including a transcript of a hearing and all exhibits entered into evidence during that hearing, but not the entire agency record.²¹⁶ In construing Indiana Code sections 4-21.5-5-13 and 4-21.5-3-33(b), which the court deemed to be the relevant statutes in determining what constituted the agency record, the court stated “the record must include all that is necessary in order for the reviewing court to accurately assess the challenged agency action.”²¹⁷ The court also stated that a party may not attempt to limit the record presented to the reviewing court by presenting only the materials and evidence which supports its position, nor may the party seek to

207. *Id.*

208. *Id.* at 926.

209. 850 N.E.2d 957 (Ind. Ct. App. 2006).

210. *Id.* at 960-61.

211. *Id.*

212. *Id.* at 961.

213. *Id.* at 966-67.

214. *Id.* at 961-62.

215. *Id.*

216. *Id.* at 961.

217. *Id.* at 965.

introduce evidence which was not party of the agency proceeding below.²¹⁸

The court stated, however, that the purpose of the statutes was not to require the inclusion of irrelevant and/or superfluous documents or to operate as a “trap” for litigants who failed to include materials as part of an agency record.²¹⁹ The court noted that the parties arguing to uphold the trial court’s dismissal, the DNR and the DeKalb County Surveyor’s Office, had not presented an argument showing that any of documents omitted from the record had any relevance to the issues to be decided on judicial review.²²⁰ As such, the court characterized those parties’ positions as a “strict . . . hyper-technical, construction of the statutes governing agency records.”²²¹ The court noted that Indiana Code section 4-21.5-5-13(g) can also be fairly construed as allowing minor additions or corrections to the record after the time for filing as expired.²²²

In reaching its decision, the court had to deal with two prior decisions, *Medical Licensing Board v. Provisor*,²²³ and *Indiana State Board of Education v. Brownsburg Community School Corp.*²²⁴ The court found its decision to be consistent with *Provisor* and distinguishable from *Brownsburg*. At the end of its opinion, the court stated that even though the language in *Brownsburg* might be read as establishing a “strict rule that all documents created during the course of an administrative ‘proceeding’ must be made part of the agency record for purposes of judicial review” the court would not apply a strict rule in this case.²²⁵

Judge Mathias dissented from the opinion and stated that the legislature had already determined the “essential” parts of an agency record to be filed for judicial review in Indiana Code section 4-21.5-3-33.²²⁶ He also stated “where a narrow statutory remedy is given, the time and manner of asserting such right must be strictly followed[.]”²²⁷ He noted that the court had previously held that timely filing of an agency record is a prerequisite to the trial court obtaining jurisdiction and that he believed filing of a complete agency record must also be filed for the court to acquire jurisdiction.²²⁸

218. *Id.*

219. *Id.*

220. *Id.* at 966.

221. *Id.*

222. *Id.* at 966-67 (citing *Seattle Painting Co., Inc. v. Comm’r of Labor*, 661 N.E.2d 596, 598 (Ind. Ct. App. 1996)).

223. 678 N.E.2d 814 (Ind. Ct. App. 1997).

224. 813 N.E.2d 330 (Ind. Ct. App. 2004).

225. *Izaak Walton League of Am.*, 850 N.E.2d at 968.

226. *Id.* at 968 (Mathias, J., dissenting).

227. *Id.* at 969 (quoting *Shipshewana Convenience Corp. v. Bd. of Zoning Appeals*, 656 N.E.2d 812, 814 (Ind. 1995)).

228. *Id.*

II. AGENCY ACTION

A. *Scope of Agency Action*

Whether administrative agencies act through adjudication or rulemaking, a common issue in administrative law is whether the agency has acted within the scope of its authority. In the Indiana Supreme Court's decision *Indiana Department of Environmental Management v. West*,²²⁹ the court addressed whether the State Employee Appeals Commission ("SEAC") had acted within its scope of authority. Three state employees who, as a result of a consolidation within IDEM, received new job assignments that did not decrease their pay but did reduce their managerial responsibilities, alleged they had been victims of age discrimination.²³⁰ The employees followed their administrative remedies by first filing complaints with the State Personnel Department and appealing those determinations to SEAC.²³¹ SEAC conducted an evidentiary hearing through a hearing officer and found that the employees had proven by a preponderance of the evidence that age bias had been a significant factor in their job changes.²³² SEAC's final order was that the employees be placed back in the supervisory positions they held before the department consolidation.²³³ The effect of SEAC's order required IDEM to create new positions for the employees that did not previously exist.²³⁴

On judicial review, the trial court affirmed SEAC's order and the court of appeals affirmed the lower court's order.²³⁵ The Indiana Supreme Court reversed, however, and unanimously found SEAC did not have authority to order the creation of new jobs.²³⁶ IDEM argued that the State Personnel Act, Indiana Code sections 4-15-1-1 to -2-31, only allows SEAC to order reinstatement in this instance.²³⁷ The Indiana Supreme Court agreed.

Interpreting Indiana Code section 4-15-1.5-6,²³⁸ the court held that the proper

229. 838 N.E.2d 408 (Ind. 2005).

230. *Id.* at 410-12.

231. *Id.* at 411.

232. *Id.* at 412.

233. *Id.*

234. *Id.*

235. *Id.* (referring to the court of appeals decision *Ind. Dep. of Env'tl. Mgmt. v. West*, 812 N.E.2d 1099 (Ind. Ct. App. 2004)).

236. *Id.* at 417-18. In a 3-2 decision, the court also found that the employees had not proven their age discrimination claims. *Id.* at 417.

237. *Id.*

238. Indiana Code section 4-15-1.5-6 provides:

The appeals commission is hereby authorized and required to do the following:

(1) To hear or investigate those appeals from state employees as set forth in IC 4-15-2, and fairly and impartially render decisions as to the validity of the appeals or the lack thereof. Hearings shall be conducted in accordance with IC 4-21.5.

(2) To make, alter, or repeal rules by a majority vote of its members for the purpose of

emphasis should be placed on section (1), which in referring to Indiana Code section 4-15-2 limits SEAC's remedial authority and provides only for reinstatement where action is taken on the basis of politics, religion, sex, age, race, or membership in an employee organization.²³⁹ Although section (3) of Indiana Code section 4-15-1.5-6 provides that SEAC may recommend policy to the personnel department, the court interpreted the statute to mean that SEAC's authority under section (3) was independent from its authority under section (1).²⁴⁰

An agency's implicit authority was discussed in *Clay Township of Hamilton County v. Clay Township Regional Waste District*.²⁴¹ In *Clay Township*, a Regional Waste District ("RWD") Board sought to change the municipalities that appointed the Board's members.²⁴² Clay Township ("Township"), who under the RWD Board's action, would have less appointees to the RWD Board under the reallocation, sought injunctive relief on the grounds that the RWD Board's action was an unlawful modification of the RWD's previously approved organizational plan.²⁴³ The trial court denied the Township's request for a preliminary injunction.²⁴⁴ The basis for the trial court's decision was that Indiana Code section 13-26-5-4 gave the board broad authority, including authority to "[p]rotect and preserve the works and improvements, and properties owned or controlled by the district."²⁴⁵

During the preliminary injunction hearing, a witness from IDEM testified that IDEM would not consider or act on a request by a RWD to reallocate the appointments because IDEM did not have legal authority to do so.²⁴⁶ The supreme court sharply disagreed with this contention. The court stated that "it is a well-settled principle of law that an administrative agency, in addition to the express powers conferred by statute, also has such implicit power as is necessary to effectuate the regulatory scheme outlined by . . . statute."²⁴⁷ The court also stated that "[l]aw is the province of the judiciary, and courts rather than administrative agencies are charged with the responsibility to resolve questions of statutory construction."²⁴⁸ The court found that IDEM's interpretation would

conducting the business of the commission, in accordance with the provisions of IC 4-22-2.

(3) To recommend to the personnel director such changes, additions, or deletions to personnel policy which the appeals commission feels would be beneficial and desirable.

239. *West*, 838 N.E.2d at 417.

240. *Id.* at 417-18.

241. 838 N.E.2d 1054 (Ind. Ct. App. 2005).

242. *Id.* at 1058.

243. *Id.* at 1058-59.

244. *Id.* at 1061-62.

245. *Id.* at 1065 (citing IND. CODE § 13-26-5-4(b)(1) (2004)).

246. *Id.* at 1060.

247. *Id.* at 1067 (citing *Barco Beverage Corp. v. Ind. Alcoholic Beverage Comm'n*, 595 N.E.2d 250, 254 (Ind. 1992)).

248. *Id.* (citing *Mance v. Bd. of Dir. of Pub. Employees' Ret. Fund*, 652 N.E.2d 532, 534 (Ind.

produce an absurd result, that a RWD board is only accountable to itself and that the legislature would not have intended such a result.²⁴⁹

*Kankakee Valley Rural Electric Membership Corp. v. United Telephone Co. of Indiana*²⁵⁰ addresses the scope of the IURC's authority in the limited context of a pole attachment statute.²⁵¹ The court of appeals ruled that the IURC was within the scope of its authority to resolve a pole attachment dispute with two telephone companies.²⁵² The Rural Electric Membership Corporation ("REMC") argued that two statutes, Indiana Code sections 8-1-2-5 and 8-1-13-18.5, were in direct conflict with each other and that the IURC retained jurisdiction over only those issues specified by section 8-1-13-18.5.²⁵³ The court of appeals found that the two statutes were not in conflict and read the opt-out statute, Indiana Code section 8-1-13-18.5, as preventing future "utility regulation" over the REMC.²⁵⁴ The court found that the pole attachment statute was not "utility regulation" because it applied to any entity that owns poles, not just public utilities.²⁵⁵

*Fox v. Green*²⁵⁶ deals with how an agency conducts its actions. Green had been appointed as a board member of a RWD.²⁵⁷ Several months later he was told by a member of the town council that he had been replaced on the board.²⁵⁸ Green filed suit against the town council alleging he had been improperly removed.²⁵⁹ The trial court agreed that Green had been improperly removed and the court of appeals affirmed that decision.²⁶⁰

The court noted the well-settled principle that "boards and commissions speak or act officially only through the minutes and records made at duly organized meetings."²⁶¹ Accordingly, "[e]vidence outside of the board's minutes and records that the board presumed to act in its official capacity is not competent evidence to substitute for the minutes and records of regular board action."²⁶² The court indicated that minutes of the Town Council should speak for themselves and they did not demonstrate a belief of the Council that it could

Ct. App. 1995)).

249. *Id.*

250. 843 N.E.2d 987 (Ind. Ct. App. 2006).

251. *Id.*

252. *Id.* at 989-90.

253. *Id.* at 991-92.

254. *Id.* at 992.

255. *Id.*

256. 856 N.E.2d 86 (Ind. Ct. App. 2006).

257. *Id.* at 87.

258. *Id.* at 88.

259. *Id.*

260. *Id.* at 88-89.

261. *Id.* (citing *Borsuk v. Town of St. John*, 820 N.E.2d 118, 123 (Ind. 2005) (quoting *Brademas v. St. Joseph County Comm'rs*, 621 N.E.2d 1133, 1137 (Ind. Ct. App. 1993))).

262. *Id.* at 88-89 (citing *Scott v. City of Seymour*, 659 N.E.2d 585, 590 (Ind. Ct. App. 1995)).

remove Green at any time from the RWD Board.²⁶³

B. Open Door/Open Records

*Dillman v. Trustees of Indiana University*²⁶⁴ addresses Indiana's Open Door Act.²⁶⁵ Dillman brought a suit against the university trustees for failing to follow Indiana's Open Door Act when it fired Indiana University men's basketball coach, Bobby Knight.²⁶⁶ The trial court determined the Open Door law had not been violated and the court of appeals affirmed that decision.²⁶⁷

In September 1987, before problems with Knight arose, and while the university had a different president, the Board of Trustees passed a resolution which retained their authority to set policy, but delegated the authority to manage and administer the university to the president.²⁶⁸ On May 14, 2000, the Trustees held an executive session, where they discussed possible sanctions and termination of Knight's employment with then president, Myles Brand.²⁶⁹ On September 9, 2000, Brand met first with four trustees and then with the remaining four trustees to discuss other instances of Knight's misconduct, including an alleged battery of an Indiana University freshman.²⁷⁰ Brand's meeting with only four trustees at a time was deliberate, in order "to exclude any impropriety with respect to the Open Door Act."²⁷¹

The court of appeals stated "[t]he purpose of the Open Door law is to assure that the business of the State of Indiana and its political subdivisions be conducted openly so that the general public may be fully informed."²⁷² The court also noted that Indiana Code section 5-14-1.5-1 requires the Open Door Act to be liberally construed in order to give effect to the legislature's intention.²⁷³ Finally, the court stated "[T]he Open Door Law requires that, except for those situations where an executive session is authorized, 'all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them.'"²⁷⁴

Indiana Code section 5-14-1.5-2(c) states a meeting is "a gathering of a majority of the governing body of a public agency for the purpose of taking

263. *Id.*

264. 848 N.E.2d 348 (Ind. Ct. App. 2006).

265. IND. CODE §§ 5-14-1.5-1 to -8 (2005).

266. *Dillman*, 848 N.E.2d at 349.

267. *Id.*

268. *Id.* at 350.

269. *Id.*

270. *Id.*

271. *Id.* (quoting Brand's deposition testimony).

272. *Id.* (citing *Frye v. Vigo County*, 769 N.E.2d 188, 192 (Ind. Ct. App. 2002); IND. CODE § 5-14-1.5-1 (2005)).

273. *Id.* at 351 (citing IND. CODE § 5-14-1.5-1 (2005)).

274. *Id.* (citing IND. CODE § 5-14-1.5-3(a) (2005)).

official action on public business.”²⁷⁵ Dillman, who was challenging the trustee’s action, argued that a “meeting” could include consecutive gatherings of less than a majority.²⁷⁶ The court of appeals rejected this construction.²⁷⁷

The court listed a variety of reasons in reaching its conclusion. First, the court relied on the specific language of Indiana Code section 5-14-1.5-2(c) which defines meeting as a “gathering of a majority.”²⁷⁸ The court also agreed with the Trustees that a public agency cannot take official action subject to the Open Door Act without a quorum present, and cited case law from several other jurisdictions agreeing with this principle.²⁷⁹ Finally, the court considered that the General Assembly had repeatedly declined to adopt amendments to the Open Door Act which would have changed the definition of a meeting to include a series of gatherings.²⁸⁰ The court concluded that “[t]his repeated refusal to amend the definition makes clear the legislature’s intent to preserve the meaning of the term ‘meeting’ as it is written.”²⁸¹

Dillman also argued that the 1987 delegation by the Trustees to the president was a delegation to the current University president, Thomas Erlich, personally, and that Brand did not therefore have authority to act.²⁸² The court rejected this argument by interpreting Indiana Code section 20-12-1-4.²⁸³

Dillman’s final argument was that the Trustees’ delegation of administrative authority to the university president should be subject to the Open Door law because the result of the Trustee’s action created “a committee of one.”²⁸⁴ Dillman relied on *Riggin v. Board of Trustees of Ball State University*.²⁸⁵ In *Riggin*, the court of appeals held that the Open Door Act applied to a five-member ad-hoc committee which reviewed a decision to discharge a tenured professor; however, the court distinguished that decision from Dillman’s case.²⁸⁶ The court of appeals concluded “the Open Door [Act] does not apply to the decisions of a properly-authorized individual university officer.”²⁸⁷

The Indiana State General Assembly made one change of substance to the Open Door Act during the survey period. Indiana Code section 5-14-1.5-6.1 added “[t]o discuss information and intelligence intended to prevent, mitigate, or

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 351-52.

280. *Id.* at 352.

281. *Id.* (citing *Miller Brewing Co. v. Bartholemew County Beverage Co.*, 674 N.E.2d 193, 206 (Ind. Ct. App. 1996)).

282. *Id.* at 352-53.

283. *Id.*

284. *Id.* at 353.

285. *Id.* (citing *Riggin v. Bd. of Tr. of Ball State Univ.*, 489 N.E.2d 616 (Ind. Ct. App. 1986)).

286. *Id.*

287. *Id.*

respond to the threat of terrorism” as an exemption from the Open Door Act.²⁸⁸

There were also a couple of statutory changes to the Open Records Act during the survey period. Indiana Code section 5-14-3-3(f) prevents lists of names and addresses the agencies may be required to provide from being used for “political purposes.” The section was amended this year to define “political purposes” as

influencing the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question or attempting to solicit a contribution to influence the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question.²⁸⁹

Indiana Code section 5-14-3-4 was amended to exempt “intelligence assessments” related to terrorist attacks from disclosure.²⁹⁰

C. Adjudications

1. *Due Process*.—Due process issues can arise with regard to agency adjudications. Several cases during the survey period had such due process issues. *Evansville Outdoor Advertising, Inc. v. Princeton (City) Plan Commission*²⁹¹ discusses due process in the context of validity of a zoning ordinance.²⁹² “It is well-settled that zoning ordinances must be precise, definite and certain in expression so as to enable both the landowner and municipality to act with assurance and authority regarding local land use decisions.”²⁹³ “This requirement is dictated by due process considerations in that the ordinance must provide fair warning as to what the governing body will consider in making a decision.”²⁹⁴

The court of appeals found that the zoning ordinance at issue in EOA’s case was sufficiently specific.²⁹⁵ The ordinance listed several factors, including landscaping, ease of access, light, air, costs and adjacent uses.²⁹⁶

In *P/S, Inc. v. Indiana Department of State Revenue*,²⁹⁷ a taxpayer challenged whether he had received sufficient notice of agency action.²⁹⁸ The taxpayer was

288. IND. CODE § 5-14-1.5-6.1 (2005).

289. *Id.* § 5-14-3-3(f).

290. *Id.* § 5-14-3-4(b)(19)(F).

291. 849 N.E.2d 630 (Ind. Ct. App. 2006).

292. *Id.* at 634.

293. *Id.* (citing *T.W. Thom Const., Inc. v. City of Jeffersonville*, 721 N.E.2d 319, 327 (Ind. Ct. App. 1999)).

294. *Id.*

295. *Id.* at 635.

296. *Id.*

297. 853 N.E.2d 1051 (Ind. Tax Ct. 2006).

298. *Id.* at 1052. *Ennis v. Department of Local Government Finance*, 835 N.E.2d 1119, 1120 (Ind. Tax Ct. 2005) was decided during the survey period and addresses the sufficiency of notice

subject to the Indiana Underground Storage Tank Fee.²⁹⁹ The fees for years 1995 through 2001 were not paid on time and the Department of Revenue eventually issued tax warrants to collect the unpaid fees.³⁰⁰ The taxpayer paid the warrants in full, but then requested a refund for the portion of the fees that included interest, collection fees, and clerk costs.³⁰¹ The Department denied the refund request and the tax court upheld that decision.³⁰²

The taxpayer alleged that he had not received the annual notices regarding the Underground Storage Tank Fee, although it was undisputed that the Department of Revenue had mailed the notices.³⁰³ “When an administrative agency sends notice through the regular course of mail, a presumption arises that such notice is received.”³⁰⁴ The presumption is rebuttable, but here the taxpayer presented no evidence in support of its claim, other than its conclusory statement.³⁰⁵ This was not sufficient to rebut the presumption.

2. *Hearsay Evidence*.—Admission of hearsay evidence is proper in an administrative proceeding, but admission is not without limitation.³⁰⁶ In *McHugh*,³⁰⁷ an employee who alleged she had been wrongfully fired by employer applied for unemployment benefits.³⁰⁸ The Indiana Department of Workforce Development (“IDWD”) determined the employee was not discharged for just cause and the employer appealed.³⁰⁹ An ALJ with the IDWD reversed the prior determination and the employee appealed.³¹⁰

The employee appears to have had a very weak case, as she lied to her employer about needing time off to attend to personal matters and then went to Carburetion Day.³¹¹ She admitted as much during the evidentiary hearing, but then challenged the IDWD’s decision as being based only on hearsay evidence.³¹² Because of the employee’s admission, however neither the IDWD nor the court

from an administrative agency. *Ennis* was discussed in Jennifer W. Terry, *Survey of Administrative Law*, 39 IND. L. REV. 749, 771 (2006).

299. *P/S, Inc.*, 853 N.E.2d at 1052.

300. *Id.*

301. *Id.*

302. *Id.* at 1055.

303. *Id.* at 1054.

304. *Id.* (citing *Abdirizak v. Review Bd. of Ind. Dep’t of Workforce Dev.* 826 N.E.2d 148, 150 (Ind. Ct. App. 2005)).

305. *Id.*

306. *McHugh v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 842 N.E.2d 436 (Ind. Ct. App. 2006) (citing *Hinkle v. Garrett-Keyser-Butler Sch. Dist.*, 567 N.E.2d 1173, 1178 (Ind. Ct. App. 1991)).

307. *Id.* at 441.

308. *Id.* at 439.

309. *Id.*

310. *Id.* at 440.

311. *Id.* at 441.

312. *Id.* at 441-42.

of appeals had to base its decision on hearsay evidence.³¹³

3. *Other Issues.*—*Legacy Healthcare, Inc. v. Barnes & Thornburg*,³¹⁴ raises some unusual other issues. The law firm prevailed in malpractice action brought against it by a client it had represented in Medicaid administrative proceedings.³¹⁵ One of the client/healthcare provider's grounds for alleging malpractice was that the law firm had failed to appeal an order and that a stay could have been obtained from the administrative agency if an appeal had been filed.³¹⁶ Neither party directed the court of appeals to the standard governing the issuance of a stay, but in seeming to indicate administrative stays are proper to grant, the court referred to the standard in Indiana Code section 4-21.5-5-9 governing the issuance of a stay upon judicial review of a final agency action.³¹⁷ Using that standard, the court indicated the litigant would have to show a reasonable probability that the order or determination appealed from was invalid or illegal, a showing that the healthcare provider could not make in this case.³¹⁸

One of the healthcare provider's other arguments revolved around failure to appeal a decision disqualifying a particular ALJ.³¹⁹ The court characterized the healthcare provider's argument as being entitled to have a particular judge hear its case.³²⁰ The court held that no party is entitled to a particular judge in any proceeding.³²¹

D. Rulemakings

There were no reported cases during the survey period regarding agency rulemakings. There were, however, a few fairly minor changes to the statutory framework regarding rulemakings.³²²

Agencies are no longer required to send copies of proposed rules to the Indiana Secretary of State, but they must still send copies to the publisher of the Indiana Register and Indiana Administrative Code.³²³ Indiana Code section 4-22-2-23.1 exempted agencies from soliciting public comments for emergency rulemaking proceedings.³²⁴ Additional requirements for electronic notices were

313. *Id.*

314. 837 N.E.2d 619 (Ind. Ct. App. 2005).

315. *Id.* at 621-22.

316. *Id.* at 637.

317. *Id.*

318. *Id.* at 637-38.

319. *Id.* at 625-26.

320. *Id.* at 626.

321. *Id.* (citing *Cornett v. Johnson*, 571 N.E.2d 572, 575 (Ind. Ct. App. 1991)).

322. Changes which were made to statutes for changes in terminology, changes in statutory references, or other minor issues are not reported in this survey Article.

323. See IND. CODE §§ 4-22-2-20, -21, -34, -35, -38, -39, -40, -41; 4-22-2.5-4; 4-22-9-1 (2005).

324. *Id.* § 4-22-2-23.1.

added to Indiana Code sections 4-22-2-19 and 25.³²⁵ Indiana Code section 4-22-2-28.1 clarified and limited the rulemakings that a small business regulatory coordinator must be assigned.³²⁶

CONCLUSION

Indiana's statutory AOPA, ARPA and Open Door and Records framework has now been in effect for over twenty years. As shown by the cases in this survey period, administrative agencies continue to "fill in the details" in areas of the environment, government, health care, taxation, utility law, and even basketball coaches. Indiana's administrative laws specify the often limited, but important role that the courts play in reviewing administrative action.

325. *Id.* §§ 4-22-2-19, 25.

326. *Id.* § 4-22-2-28.1.

RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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During the survey period,¹ the Indiana Supreme Court and the Indiana Court of Appeals rendered decisions both changing fundamental principles of state procedural law and providing helpful interpretations of the Indiana Rules of Trial Procedure (“Rules” or “Indiana Trial Rules”). Amendments to the Rules were minimal during the survey period. Nevertheless, appellate interpretation of the Rules continued to effect an evolution of the manner in which the Rules are applied in practice.

I. INDIANA SUPREME COURT DECISIONS

A. *Personal Jurisdiction Reduced to One-Step Analysis*

In 2003, Rule 4.4(A)—Indiana’s “long arm” jurisdiction statute—was amended to include the following language: “In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.”² Since the amendment, state and federal courts have disagreed whether the amendment reduced the personal jurisdictional analysis from two steps to one or whether the retention of specific, enumerated acts satisfying statutory long-arm jurisdiction evidenced an intent to retain a two-step jurisdictional analysis.³

In *LinkAmerica Corp. v. Albert*,⁴ the Indiana Supreme Court resolved the

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—from October 1, 2004, through September 30, 2005, except where otherwise indicated—as well as amendments to the Indiana Rules of Trial Procedure that were ordered by the Indiana Supreme Court during the survey period.

2. IND. TRIAL R. 4.4(A).

3. *Compare* *Litmer v. PDQUSA.com*, 326 F. Supp. 2d 952, 955 n.3 (N.D. Ind. 2004) (finding that the 2003 amendment makes Indiana’s long-arm statute coextensive with the limits of due process, “allowing courts to collapse the prior two-prong analysis into a single inquiry: whether the exercise of personal jurisdiction comports with due process”), *with* *Pozzo Truck Ctr., Inc. v. Crown Beds, Inc.*, 816 N.E.2d 966, 969 n.2 (Ind. Ct. App. 2004) (concluding, based at least in part on the retention of the specific, enumerated acts in amended Rule 4.4(A), that Indiana courts will continue to apply the two-step analysis, “first determining whether the conduct falls under the long-arm statute and then whether it comports with the Due Process Clause as interpreted by the United States Supreme Court and courts in this state”), *and* Michael A. Dorelli, *Recent Developments in Indiana Civil Procedure*, 39 IND. L. REV. 817, 831 n.115 (2006) (“[T]he enumerated acts may have been included in the amended Rule as specific but non-exhaustive bases for a finding of constitutional due process.”).

4. 857 N.E.2d 961 (Ind. 2006). The *LinkAmerica* decision was rendered December 5, 2006, just outside the current survey period. However, the ruling is included given its significant,

issue, clarifying that the 2003 amendment to Rule 4.4(A), despite its retention of the specific, enumerated acts satisfying long-arm jurisdiction, collapses the personal jurisdictional inquiry into a single step:

The 2003 amendment to [Rule 4.4(A)] was intended to, and does, reduce analysis of personal jurisdiction to the issue of whether the exercise of personal jurisdiction is consistent with the Federal Due Process Clause. Retention of the enumerated acts found in Rule 4.4(A) serves as a handy checklist of activities that usually support personal jurisdiction but does not serve as a limitation on the exercise of personal jurisdiction by a court of this state.⁵

Following a recitation of federal due process rules and standards,⁶ the court in *LinkAmerica* recognized the presumption that the contacts of a wholly owned subsidiary with the forum state “are not attributed to the parent corporation for jurisdictional purposes.”⁷ The court explained that the presumption of separateness is overcome only upon “clear evidence” that “either (1) the parent utilizes its subsidiary in such a manner that an agency relationship can be

immediate impact on jurisdictional analysis.

5. *Id.* at 967.

6. The court in *LinkAmerica* recited the due process framework for jurisdictional analysis as follows:

The Due Process Clause of the Fourteenth Amendment requires that before a state may exercise jurisdiction over a defendant, the defendant must have certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. If the defendants’ contacts with the state are so continuous and systematic that the defendant should reasonably anticipate being haled into the courts of that state for any matter, then the defendant is subject to general jurisdiction, even in causes of action unrelated to the defendant’s contacts with the forum state.

If the defendant’s contacts with the forum state are not continuous and systematic, specific jurisdiction may be asserted if the controversy is related to or arises out of the defendant’s contacts with the forum state. Specific jurisdiction requires that the defendant purposefully availed itself of the privilege of conducting activities within the forum state so that the defendant reasonably anticipates being haled into court there. A single contact with the forum state may be sufficient to establish specific jurisdiction over a defendant, if it creates a substantial connection with the forum state and the suit is related to that connection. But a defendant cannot be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts or of the unilateral activity of another party or a third person.

Finally, if the defendant has contacts with the forum state sufficient for general or specific jurisdiction, due process requires that the assertion of personal jurisdiction over the defendant is reasonable.

Id. at 967 (internal citations and quotation marks omitted) (alteration in original).

7. *Id.* at 968 (citing *Wesleyan Pension Fund, Inc. v. First Albany Corp.*, 964 F. Supp. 1255, 1261 (S.D. Ind. 1997)).

perceived; (2) the parent has greater control over the subsidiary than is normally associated with common ownership and directorship; or (3) the subsidiary is merely ‘an empty shell.’”⁸

The Indiana Supreme Court reversed the Indiana Court of Appeals’ finding that the presumption of “separateness” was overcome, discussing as significant the fact that the parent company and the subsidiary did not share common “operating personnel.”⁹ The supreme court in *LinkAmerica* evaluated the parent company’s observation of and adherence to “corporate formalities,” in addition to the contacts of common “operating personnel,” in resolving the jurisdictional issue.¹⁰ After evaluating the parent company’s adherence to corporate formalities, the court upheld the “separateness” of the parent from its subsidiary, concluding that the plaintiffs “have not provided anything to overcome the presumption that [the parent] and [subsidiary] are institutionally independent.”¹¹ Therefore, the court held, the subsidiary’s “contacts with the state cannot be attributed to [the parent].”¹²

B. Action Pending in Another Court

In *Kozlowski v. Dordieski*,¹³ the court discussed the frequent mischaracterization of a Rule 12(B)(8) defense—i.e., that “the same action is pending in another state court”—as “jurisdictional” and held that although the trial court possessed subject matter jurisdiction over the particular case before it, it properly refrained from exercising its authority under Rule 12(B)(8).¹⁴ In *Kozlowski*, the defendants had filed a writ of certiorari in Lake County Superior Court (as plaintiffs therein), challenging a decision by the Lake County Plan Commission approving a subdivision and a waiver of certain subdivision ordinance requirements.¹⁵ The superior court affirmed the commission’s decision, but the Indiana Court of Appeals reversed and remanded the matter back to the commission.¹⁶

8. *Id.* (citing *Wesleyan Pension Fund, Inc.*, 964 F. Supp. at 1261-62).

9. *Id.* at 969.

10. *Id.*

11. *Id.* at 970.

12. *Id.* Interestingly, the court recognized and addressed the similarities between personal jurisdiction analysis under the due process clause with the corporate veil-piercing doctrine. *Id.* The court recognized that

[p]iercing may, in some instances, be based on facts that also support the assertion of jurisdiction over the parent of a subsidiary. Otherwise stated, the same conduct of a foreign corporate defendant may in some cases expose it to both personal jurisdiction and liability under the laws of a particular forum.

Id.

13. 849 N.E.2d 535 (Ind. 2006).

14. *Id.* at 536-37.

15. *Id.* at 536.

16. *Id.*

Subsequently, the plaintiffs in *Kozlowski* filed a complaint for injunctive relief with the Lake County Circuit Court, seeking, among other things, an injunction against any further work.¹⁷ The circuit court entered summary judgment against the plaintiffs, stating that it did not have “subject matter jurisdiction” over the matter; rather, it concluded that the Lake County Superior Court had subject matter jurisdiction.¹⁸ The Indiana Court of Appeals affirmed the Circuit Court’s decision, holding that “the trial court correctly concluded that it lacked subject matter jurisdiction over these proceedings.”¹⁹

The Indiana Supreme Court affirmed the result reached by the court of appeals, but clarified that “subject matter jurisdiction was not the right reason.”²⁰ Recognizing that “the prevalence among this state’s bench and bar [is to] view[] various procedural defenses through a jurisdictional lens[,]”²¹ the court in *Kozlowski* analyzed the issue under Trial Rule 12(B)(8), even though at least one of the defendants alleged that the Circuit Court lacked “jurisdiction over the subject matter.”²² The court explained that under Rule 12(B)(8), “a defendant may assert as an affirmative defense that the same action is pending in another state court.”²³ Two actions are the “same if the parties, subject matter, and remedies sought are substantially the same in both suits.”²⁴ The court found that the only difference between the original certiorari petition and the later complaint for injunctive relief, for Rule 12(B)(8) purposes, “lies in [the] request in the second action to demolish the improvements, while the first action sought to prevent them from being made.”²⁵ Concluding that “[b]oth cases had substantially the same parties, subject matter, and remedies sought,” the court in *Kozlowski* held that “[t]he Lake Circuit Court was right to refrain from exercising authority over [the] case.”²⁶

17. *Id.*

18. *Id.* at 536-37.

19. *Id.* (quoting *Kozlowski v. Dordieski*, 831 N.E.2d 1270 (Ind. Ct. App. 2005)).

20. *Id.* at 537 (internal quotation marks omitted) (“[T]his case is not about subject matter jurisdiction, but rather priority.”).

21. *Id.* at 537 n.1.

22. *Id.* (quoting Appellee’s Appendix, *Kozlowski v. Dordieski*, 831 N.E.2d 1270 (Ind. Ct. App. 2005) (No. 45S05-0606-CV-223)).

23. *Id.* at 537.

24. *Id.* (quoting *Pivarnik v. N. Ind. Pub. Serv. Co.*, 636 N.E.2d 131, 134 (Ind. 1994)).

25. *Id.*

26. *Id.*; see also *Kentner v. Ind. Pub. Employers’ Plan, Inc.*, 852 N.E.2d 565, 575 (Ind. Ct. App. 2006) (reversing the trial court’s dismissal of state court complaint pursuant to Rule 12(B)(8) and principles of comity), *trans. denied*, 2007 Ind. LEXIS 130 (Ind. Feb. 22, 2007). The court in *Kentner* described “the way in which a 12(B)(8) motion should be evaluated”:

The determination of whether two actions being tried in different state courts constitute the same action depends on whether the outcome of one action will affect the adjudication of the other. The rule applies and an action should be dismissed where the parties, subject matter, and remedies are precisely or even substantially the same in both suits.

C. Waiver of Affirmative Defenses

In *Willis v. Westerfield*,²⁷ the court held that the “sudden emergency” doctrine is not an affirmative defense within the meaning of Rule 8(C) and, therefore, the defense was not waived due to the defendant’s failure to plead it as an affirmative defense in his answer.²⁸ In reaching its decision, the Indiana Supreme Court provided a helpful discussion of Rule 8(C) and the definition of an “affirmative” defense:

[Rule 8(C)] provides that “[a] responsive pleading shall set forth affirmatively and carry the burden of proving: [list of defenses] and any other matter constituting an avoidance, matter of abatement, or affirmative defense.” Pursuant to this Rule, a party seeking the benefit of an affirmative defense must raise and specifically plead that defense or it is waived. . . . The list of affirmative defenses contained in the Rule is not exhaustive.

. . . Whether a defense is affirmative “depends upon whether it controverts an element of a plaintiff’s prima facie case or raises matters outside the scope of the prima facie case.” . . . An affirmative defense is a defense “upon which the proponent bears the burden of proof and which, in effect, admits the essential allegations of the complaint but asserts additional matter barring relief.”²⁹

The court in *Willis* explained that “[s]udden emergency does not assert a matter outside the allegations of the plaintiff’s complaint.”³⁰ The fact that the proponent of the sudden emergency defense bears the burden of proof “does not in itself render the sudden emergency doctrine an affirmative defense.”³¹ In other words, according to the court in *Willis*, “the doctrine does not admit the allegations of the complaint but nevertheless excuse fault.”³² Rather, the doctrine “defines the conduct to be expected of a prudent person in an emergency

Kentner, 852 N.E.2d at 570-71 (quoting *Vannatta v. Chandler*, 810 N.E.2d 1108, 1110-11 (Ind. Ct. App. 2004)). The court in *Kentner* concluded that, in the case before it, “neither the parties, the subject matter, nor the remedies of the two lawsuits at issue [were] substantially the same[,]” nor would the outcome of one lawsuit have an “effect upon the outcome of the other.” *Id.* at 575. Regarding the trial court’s dismissal based on principles of comity, the court “applaud[ed] the trial court’s desire to respect the proceedings that [were] ongoing in its sister federal court[,]” but reiterated its conclusions on the Rule 12(B)(8) issue that there was “no need to dismiss the [state court] [l]itigation out of deference to the federal district court” *Id.* at 576.

27. 839 N.E.2d 1179 (Ind. 2006).

28. *Id.* at 1186.

29. *Id.* at 1185 (internal citations omitted).

30. *Id.*

31. *Id.*

32. *Id.*

situation.”³³

The Indiana Supreme Court disagreed with the Indiana Court of Appeals’ reasoning that “a mandatory pleading requirement for the sudden emergency doctrine would promote fairness by ‘minimizing the chances of trial by ambush’ and would allow for better preparation of suits, thereby promoting judicial efficiency.”³⁴ The Indiana Supreme Court explained that “[t]he same could be said for a number of other circumstances that may be claimed to explain conduct that may be seen as presumptively negligent. Discovery, not a pleading requirement, is the means the Rules provide to ferret these out.”³⁵

D. Judicial Notice of Admission in Answer

In *Lutz v. Erie Insurance Exchange*,³⁶ the court analyzed the appropriate procedure for using an admission in a party’s pleading to prove a fact at trial. Specifically, a third-party plaintiff requested judicial notice of the fact that a traffic light was red at the time of an accident, based on the third-party defendant’s admission of that fact in her answer to the third-party complaint.³⁷ The trial court declined the judicial notice request, the third-party plaintiff appealed and the court of appeals affirmed.³⁸

On transfer, the Indiana Supreme Court clarified that a trial court may take judicial notice of a party’s pleadings, but the facts recited in the pleadings may not be susceptible to judicial notice.³⁹ In *Lutz*, the court determined that whether or not a traffic light was red at a particular time is not the type of fact appropriate for judicial notice because it is “plainly not generally known or resolvable by resort to any unquestionable source.”⁴⁰ However, the court recognized that once the admission contained in the answer was judicially noticed, it became a “judicial admission as a matter of law.”⁴¹ The court explained the effect of an admission in a party’s pleading as follows:

Statements contained in a party’s pleadings may be taken as true as against the party without further controversy or proof. Unless a pleading is withdrawn or superseded, any admission contained in the pleading is conclusive as to that party. The reason for this is that pleadings are designed to narrow the issues required to be tried. Opposing parties

33. *Id.* (quoting *Brooks v. Friedman*, 769 N.E.2d 696, 699 (Ind. Ct. App. 2002)).

34. *Id.* at 1186.

35. *Id.*

36. 848 N.E.2d 675 (Ind. 2006).

37. *Id.* at 677.

38. *Id.*

39. *Id.* at 678.

40. *Id.* Pursuant to Indiana Evidence Rule 201(a), “[a] judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” IND. R. EVID. 201(a).

41. *Lutz*, 848 N.E.2d at 678.

prepare their case on the assumption that facts admitted by other parties require no proof. For this scheme to work properly, parties must be entitled to rely on trial courts to treat admissions in pleadings as binding on the party making the admission.⁴²

The court in *Lutz* held that the third-party plaintiff was “entitled to an instruction that as to [the third-party defendant] the light was red.”⁴³ The court questioned whether the third-party plaintiff requested such an instruction and determined that, because the jury was properly instructed on other issues that rendered the trial court’s omission of this instruction harmless, the third-party plaintiff was not prejudiced.⁴⁴

Using the *Lutz* decision as a guide, a plaintiff seeking to bind a party to an admission in a pleading should first request judicial notice of the pleading and, more specifically, the admission. Second, if the facts admitted are not subject to judicial notice under Indiana Rule of Evidence 201, the plaintiff should request an instruction regarding the admitted facts, based on the “judicial admission” of the facts in the pleading.

E. Mandatory Mediation

In *Fuchs v. Martin*,⁴⁵ the court held that a trial court “may require parties to engage in mediation as a prerequisite to contested court trials or hearings”⁴⁶ and that a court may, “in the exercise of sound discretion in discrete cases, order mediation as a prerequisite to the filing of requests for future proceedings therein.”⁴⁷ In support of its holdings, the court in *Fuchs* explained the policy supporting mandatory mediation:

The best interests of Indiana citizens and sound judicial administration are well-served when trial courts fully utilize and promote the use of mediation, which can be an enormously effective tool to facilitate the amicable resolution of disputes, to enable parties to meaningfully participate in crafting solutions that best serve their respective interests, to reduce points of contention that would otherwise require a court hearing, to minimize the destructive polarization that can accompany contested adversarial proceedings, to resolve disputes often more expeditiously and less expensively than by protracted litigation and trial proceedings, to equip parties with dispute resolution skills, and to relieve crowded trial dockets thus enabling courts to provide necessary trials

42. *Id.* (internal citations omitted).

43. *Id.*

44. *Id.*

45. 845 N.E.2d 1038 (Ind. 2006).

46. *Id.* at 1042.

47. *Id.* *Fuchs* involved a decree on a paternity petition, which included a provision that any post-decree matters would be mediated before the filing of any post-decree requests for relief.

more promptly.⁴⁸

Further, the court held that “the power of an individual trial court to order mediation in a specific case is not limited by [local rules authorizing mediation].”⁴⁹ Rather, the court explained, “[t]he fact that local rules may establish a general requirement for mediation in some situations does not limit a court from ordering it under other circumstances.”⁵⁰

F. Third-Party Spoliation of Evidence—No Independent Cause of Action

Spoliation of evidence is “the intentional destruction, mutilation, alteration, or concealment of evidence.”⁵¹ “If spoliation by a party to a lawsuit is proved, rules of evidence permit the jury to infer that the missing evidence was unfavorable to that party.”⁵² In 2005, the Indiana Supreme Court, answering a certified question from the United States District Court, held that “Indiana common law does not recognize an independent cause of action for either intentional or negligent ‘first party’ spoliation of evidence, i.e., spoliation by a party to the underlying claim.”⁵³ The Indiana Supreme Court “expressly held open the question whether Indiana law recognized a tort of spoliation by third parties, i.e., ‘persons that are not parties to litigation.’”⁵⁴

In *Gotzbach v. Froman*, the Indiana Supreme Court addressed that question and declined to recognize a claim for third-party spoliation—i.e., spoliation by persons that are not parties to the litigation—where an employee sought to impose a duty on his employer to preserve evidence of an industrial accident.⁵⁵ After reviewing prior case law from the Indiana Court of Appeals, including the court of appeals’ decision in the present case, the court in *Gotzbach* held that “existing case law and public policy dictate refusal to recognize an independent cause of action under the circumstances presented by [that] case.”⁵⁶

The court in *Gotzbach* rejected arguments that a “special relationship” was created between the employer and employee by the employer’s “knowledge of

48. *Id.* at 1041.

49. *Id.* at 1043.

50. *Id.*

51. *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000).

52. *Gotzbach v. Froman*, 854 N.E.2d 337, 338 (Ind. 2006).

53. *Id.* (quoting *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005) (concluding that “existing remedies were sufficient to outweigh the benefits of an independent tort action for first-party spoliation”)). In particular, the court in *Gribben* explained that “the remedies for destruction of evidence, including the inference that the destroyed evidence was unfavorable, criminal sanctions against the party, and professional sanctions for attorneys, were all available to deter and redress first-party spoliation.” *Gribben*, 824 N.E.2d at 355.

54. *Gribben*, 824 N.E.2d at 355.

55. *Gotzbach*, 854 N.E.2d at 339.

56. *Id.* (discussing *Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998); *Murphy v. Target Prods.*, 580 N.E.2d 687, 690 (Ind. Ct. App. 1991), *abrogation recognized by City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368 (Ind. Ct. App. 2002)).

[the] situation and the circumstances surrounding the accident”⁵⁷ and that “the foreseeability of harm caused by the failure to retain [the evidence] supports the recognition of a duty.”⁵⁸ In addition, the court determined that “policy considerations are the controlling factor in refusing to recognize spoliation as a tort under [the circumstances in the case].”⁵⁹ Rejecting the argument that the policy of deterring spoliation required recognition of an independent cause of action against third parties, the court explained the following:

We agree that evidentiary inferences are not available as a remedy for or deterrent to third-party spoliation. Many of the other remedies remain applicable, however. Criminal sanctions apply equally to third parties and first parties. Similarly, sanctions under the Indiana Rules of Professional Conduct are available if attorneys for the third party are involved in the misconduct. Courts also have the power to issue contempt sanctions against non-parties who frustrate the discovery process by suppressing or destroying evidence.⁶⁰

Finally, the court in *Glottbach* reasoned that “[p]roving damages in a third-party spoliation claim becomes highly speculative and involves a lawsuit in which the issue is the outcome of another hypothetical lawsuit.”⁶¹ The court expressed concern that a “jury would be asked to determine what the damages would have been had the evidence been produced and what the collectibility of these damages would have been.”⁶² The court stated that “this exercise often could properly be described as ‘guesswork.’”⁶³

57. *Id.* at 339. The court reasoned that

an employer will virtually always be aware of an injury occurring in the workplace. If that knowledge were sufficient to establish a special relationship, the practical effect would be that an employer always has a duty to preserve evidence on behalf of its employee for use in potential litigation

Id. at 339-40.

58. *Id.* at 340. The court explained that “the relationship of the parties, not foreseeability” was the central factor, and it ruled that “[m]ere ownership of potential evidence, even with knowledge of its relevance to litigation, does not suffice to establish a duty to maintain such evidence.” *Id.* at 340-41 (quoting *Reinhold v. Harris*, 2000 U.S. Dist. LEXIS 16643, at *8 (S.D. Ind. Nov. 7, 2000)).

59. *Id.* at 341.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (citing *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986)) (“It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff’s success on the merits of the underlying lawsuit.”).

G. Deemed Denial of Motion to Correct Error

Pursuant to Indiana Trial Rule 53.3(A), a motion to correct error is “deemed denied” if (1) the court fails to set the motion for hearing within forty-five days, or (2) the court fails to rule on the motion within thirty days after it was heard or forty-five days after it was filed, if no hearing is required.⁶⁴ Further, Rule 53.3(A) provides that any appeal must be initiated within thirty days after the motion is deemed denied.⁶⁵

In *Garrison v. Metcalf*,⁶⁶ the Indiana Supreme Court held that a motion to correct error was deemed denied thirty days after a hearing on the motion, despite that the trial court belatedly granted the motion thirty-six days after the hearing.⁶⁷ More specifically, the court in *Metcalf* ruled that the trial court’s belated grant of the motion was invalid because the moving party failed to file a notice of appeal within thirty days after the date on which the motion was deemed denied.⁶⁸

The court in *Metcalf* distinguished its prior decision in *Cavinder Elevators, Inc. v. Hall*,⁶⁹ in which it ruled that a trial court’s belated grant of a motion to correct error could stand where the moving party filed a notice of appeal within thirty days of the date of the deemed denial.⁷⁰ In the present case, the moving party failed to file a notice of appeal. As such, the Indiana Supreme Court held that the motion was deemed denied pursuant to Rule 53.3(A) and the trial court’s belated grant of the motion was invalid.⁷¹

The court apparently recognized the harshness of its decision and the “peculiarity” of the seemingly meaningless act of filing a notice of appeal *after* a motion to correct error is belatedly granted:

We admit that it seems somewhat odd to require a notice of appeal to be filed after a motion to correct error has been belatedly granted in order to validate the grant of the motion to correct error. But this peculiarity is a function of the date on which the trial court belatedly ruled in this particular case; that will not always be so Eliminating the possibility of this peculiarity would effectively amend the deadline in Trial Rule 53.3(A) for ruling on motion to correct errors from 30 to 60 (or 45 to 75) days.⁷²

In short, under *Metcalf*, if a trial court belatedly grants a motion to correct error, the moving party must file a notice of appeal within thirty days after the

64. IND. TRIAL R. 53.3(A).

65. *Id.*

66. 849 N.E.2d 1114 (Ind. 2006).

67. *Id.* at 1116.

68. *Id.*

69. 726 N.E.2d 285 (Ind. 2000).

70. *Metcalf*, 849 N.E.2d at 1115 (discussing *Cavinder*, 726 N.E.2d at 289).

71. *Id.* at 1116.

72. *Id.*

“deemed denial” date in order to “validate” the trial court’s belated ruling. Whether the appeal must actually be litigated in order to effectuate the validation is not addressed in *Metcalfe*. Further, the *Metcalfe* decision implies that if a trial court belatedly *denies* a motion to correct error, the thirty-day deadline for filing a notice of appeal would run from the date on which the motion was deemed denied—i.e., not from the actual denial date.

H. Three Day Extension for Service by Mail

In *McDillon v. Northern Indiana Public Service Co.*,⁷³ the Indiana Supreme Court resolved “an apparent conflict among Indiana cases regarding the application of Rule 6(E) and its automatic three-day extension of time when court orders are mailed.”⁷⁴ Rule 6(E) provides as follows:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three [3] days shall be added to the prescribed period.⁷⁵

After analyzing prior decisions from the Indiana Court of Appeals interpreting Rule 6(E), sometimes with differing results, the court in *McDillon* clarified that Rule 6(E)’s three-day extension of time “applies only when a party has a right or is required to do some act within a prescribed period after the service of a notice or other paper.”⁷⁶ According to the court in *McDillon*, the Rule “does not apply to extend periods that are triggered by the mere *entry* of the order or the happening of an event other than the *service* of notice or other paper.”⁷⁷

I. Motion for Relief from Judgment

In *Allstate Insurance Co. v. Fields*,⁷⁸ the court clarified that Trial Rule 60(B), governing motions for relief from judgment, does not authorize a motion for relief from an interlocutory order.⁷⁹ The issue arose in the context of an attempted appeal from the trial court’s order denying a motion for relief from an order entering a default on liability but setting the case for trial on damages.⁸⁰

The court in *Fields* discussed prior amendments to Rule 60, as well as

73. 841 N.E.2d 1148 (Ind. 2006).

74. *Id.* at 1150-51.

75. IND. TRIAL R. 6(E).

76. *McDillon*, 841 N.E.2d at 1152.

77. *Id.* (emphasis added). The court in *McDillon* recognized that the trial court did not apply or interpret Rule 6(E) in reaching its decision—which involved the timeliness of a jury trial demand following an order setting aside a default judgment—nor was Rule 6(E) raised by either party on appeal. *Id.*

78. 842 N.E.2d 804 (Ind. 2006).

79. *Id.* at 806.

80. *Id.*

interpretive case law, in reaching its conclusion that inclusion of the phrase “entry of default” in Rule 60(B) does not render the rule applicable to interlocutory orders of default that do not constitute final judgments.⁸¹ The court explained that “fairness and sound judicial administration do not favor granting an exceptional privilege of immediate appellate access to a party defaulted for failure to comply with applicable rules or court orders.”⁸²

The court elaborated on the intended function of Rule 60(B) and (C):

The function of Rule 60(B) is to permit parties to challenge a judgment at a point subsequent to the expiration of the time allowed for filing a motion to correct error or initiating an appeal. When a trial court denies such a 60(B) motion, a party aggrieved thereby must have an opportunity to appeal. Trial Rule 60(C) establishes that such a ruling constitutes a final judgment, thus permitting an appeal, and triggers the timing deadline for taking such an appeal.⁸³

According to the court in *Fields*, a motion to reconsider the entry of default on the issue of liability would have been the appropriate procedural mechanism for challenging the trial court’s ruling.⁸⁴ Because a motion to reconsider is not a request for relief under Rule 60(B), a denial of the motion would not be “deemed a final judgment” or otherwise appealable pursuant to Rule 60(C).⁸⁵

The court in *Fields* recognized that the trial court properly could have treated the Rule 60(B) motion as a motion for reconsideration.⁸⁶ Because the trial court denied the motion and no certification of the trial court’s interlocutory ruling was sought, the Indiana Supreme Court dismissed the appeal and remanded the matter to the trial court for further proceedings.⁸⁷

II. INDIANA COURT OF APPEALS’ DECISIONS

A. Venue

1. *Preferred Venue*—“*Sufficient Nexus Test*.”—In *Skeffington v. Bush*,⁸⁸ the court of appeals evaluated whether a “sufficient nexus” existed between land and the underlying action, such that venue was proper under Trial Rule 75(A)(2), which states that preferred venue lies in “the county where the land or some part

81. *Id.* at 807-08 (discussing *Pathman Constr. Co. v. Drum-Co Eng’g Corp.*, 402 N.E.2d 1 (Ind. Ct. App. 1980)).

82. *Id.* at 808.

83. *Id.* at 808-09.

84. *Id.* at 809.

85. *Id.*

86. *Id.*

87. *Id.* The supreme court explained that by granting transfer, the decision of the Indiana Court of Appeals was vacated, making dismissal and remand the appropriate procedural course. *Id.*

88. 846 N.E.2d 761 (Ind. Ct. App. 2006).

thereof is located or the chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto or relating to such land or such chattels.”⁸⁹

Specifically, in *Bush*, the plaintiff contracted with the Gary Community School Corporation to install new surfaces on five football fields located in Lake County.⁹⁰ The plaintiff subcontracted with the defendant to hydro-seed the football fields.⁹¹ When the grass did not grow as the defendant had guaranteed, the plaintiff “subcontracted with two other firms to install sod on three of the football fields.”⁹² The plaintiff then filed suit against the defendant, alleging breach of contract, breach of warranty and negligence in the performance of the work.⁹³ The defendant filed a motion to transfer venue to Porter County, where he resides and his business is located.⁹⁴ The motion was granted by the trial court, which concluded that there was “no nexus between the suit and the Lake County land of the Gary Community School Corporation.”⁹⁵

The court in *Bush* explained that “[a] claim relates to the land under [Trial Rule 75(A)(2)] if there is a sufficient nexus between the land and the underlying action.”⁹⁶ “The nexus test will be affected by such factors as, but not limited to, whether the acts giving rise to the liability occurred there, and whether examination of the site may be necessary to resolve the dispute.”⁹⁷

The court held that a “sufficient nexus” existed “between [the plaintiff’s] action and the football fields [the defendant] hydro-seeded for [the plaintiff’s] complaint to allege claims related to land.”⁹⁸ “Because the land is in Lake County, preferred venue lies there.”⁹⁹ The court of appeals reversed the trial court’s decision transferring venue to Porter County.¹⁰⁰

2. *Jurisdiction of Court upon Change of Judge.*—In *City of Gary v. Enterprise Trucking & Waste Hauling*,¹⁰¹ the court held that “the trial court did not have jurisdiction to enter a *permanent* injunction after it had already granted [a] change of judge motion.”¹⁰² “It is the general rule that once a proper and timely motion for change of venue is filed, the trial court is divested of jurisdiction to take further action except to grant the change of venue.”¹⁰³ The

89. *Id.* at 763 (quoting IND. TRIAL R. 75(A)(2)).

90. *Id.* at 762.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 763.

97. *Id.* (quoting *Diesel Constr. Co. v. Cotten*, 634 N.E.2d 1351, 1354 (Ind. Ct. App. 1994)).

98. *Id.* at 763-64.

99. *Id.* at 764 (citing IND. TRIAL R. 75(A)(2)).

100. *Id.*

101. 846 N.E.2d 234 (Ind. Ct. App. 2006).

102. *Id.* at 243 (emphasis added).

103. *Id.* at 241 (quoting *City of Fort Wayne v. State ex rel. Hoagland*, 342 N.E.2d 865, 869

court in *Enterprise* evaluated whether a request for a permanent injunction is an “emergency matter” within the meaning of Trial Rule 79(O), which provides “[n]othing in [Rule 79] shall divest the original court and judge of jurisdiction to hear and determine emergency matters between the time a motion for change of judge is filed and the appointed special judge accepts jurisdiction.”¹⁰⁴ Based primarily on a comparison of the appellate implications of preliminary and permanent injunctions, the court in *Enterprise* concluded that “a permanent injunction is not an emergency matter.”¹⁰⁵ As such, the court held that “the trial court did not have jurisdiction to enter [the] permanent injunction after it had already granted the . . . change of judge motion.”¹⁰⁶

B. Statute of Limitations

1. *Discovery Rule*.—The “discovery rule,” as it relates to the accrual of a statute of limitations, “provides that a cause of action accrues when a party knows or in the exercise of ordinary diligence could discover, that [a] contract has been breached or that an injury had been sustained as a result of the tortious act of another.”¹⁰⁷ In *Perryman v. Motorist Mutual Insurance Co.*,¹⁰⁸ the court held that “the discovery rule only postpones the statute of limitations by belated discovery of key facts and not by delayed discovery of legal theories.”¹⁰⁹

Specifically, the plaintiff in *Perryman* argued that his cause of action—an insurance coverage action based on a pollution exclusion in the policy—did not accrue when he became aware of his “injury,” in March 1994, but instead it accrued “in 2004 when he became aware of [the Indiana Supreme Court’s] decision in *American States Insurance Co. v. Kiger*,¹¹⁰ adopting, as an issue of first impression, the rule that an absolute pollution exclusion in an insurance policy . . . is ambiguous and unenforceable.”¹¹¹ In other words, the plaintiff in *Perryman* claimed that, although he was aware of his “injury,” he was unaware “of the purported accrual of his injury’s legal ramifications” until after he learned of the supreme court’s *Kiger* decision in 2004 (i.e., approximately eight years after the *Kiger* decision was rendered).¹¹² In that regard, the plaintiff requested “an expansion of the discovery rule to, not only awareness of a sustained injury,

(Ind. App. 1976)).

104. *Id.* at 242 (quoting IND. TRIAL R. 79(O)).

105. *Id.* at 243 (emphasis added).

106. *Id.* (citing *Justak v. Bochnowski*, 391 N.E.2d 872, 877 (Ind. Ct. App. 1979)).

107. *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 688-89 (Ind. Ct. App. 2006) (citing *Strauser v. Westfield Ins. Co.*, 827 N.E.2d 1181, 1185 (Ind. Ct. App. 2005)).

108. 846 N.E.2d at 683.

109. *Id.* at 689 (citing *Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 579 (Utah Ct. App. 1996); *Andres v. McNeil Co.*, 707 N.W.2d 777, 786 (Neb. 2005); *Troum v. Newark Beth Israel Med. Ctr.*, 768 A.2d 177 (N.J. Super. Ct. App. Div. 2001)).

110. 662 N.E.2d 945 (Ind. 1996).

111. *Perryman*, 846 N.E.2d at 688.

112. *Id.* at 689.

but also knowledge of his legal causes of action.”¹¹³

Rejecting the plaintiff’s argument, the court in *Perryman* described the general purpose of a statute of limitation as follows:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.¹¹⁴

Recognizing that no Indiana cases supported its conclusion that the discovery rule does *not* encompass knowledge of a legal cause of action, the court in *Perryman* looked to foreign decisional authority:

[A] review of foreign case law supports our conclusion that the application of the discovery rule does not mandate that plaintiffs know with precision the legal injury that has been suffered, but merely anticipates that a plaintiff be possessed of sufficient information to cause him to inquire further in order to determine whether a legal wrong has occurred.¹¹⁵

The court in *Perryman* concluded that:

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery developed.¹¹⁶

The court held that “the discovery of an injury, not the development of new case law, commences the running of the statute of limitations.”¹¹⁷ In other words,

113. *Id.*

114. *Id.*

115. *Id.* (citing *Healy v. Owens-Illinois, Inc.*, 833 N.E.2d 906, 910 (Ill. App. Ct. 2005); *Clare v. Saberhagen Holdings, Inc.*, 123 P.3d 465, 468 (Wash. Ct. App. 2005); *McIntosh v. Blanton*, 164 S.W.3d 584, 586 (Tenn. Ct. App. 2005)).

116. *Id.* (quoting *Mitchell v. Holler*, 429 S.E.2d 793, 795 (S.C. 1993)). “Stated more succinctly, the law does not require a smoking gun in order for the statute of limitations to commence.” *Id.* (citing *Giraud v. Quincy Farm & Chem.*, 6 P.3d 104, 109 (Wash. Ct. App. 2000)).

117. *Id.* at 690. The court in *Perryman* also ruled that the defendant was not equitably estopped from asserting the statute of limitations as a defense, due to its alleged “fraudulent concealment” of the change in the law resulting from the supreme court’s decision in *Kiger*. *Id.* at 691. Specifically, the court in *Perryman* declined to impose a duty to inform an insured plaintiff of a published decision, because the decision “was a matter of public record, equally available and accessible to [the insured].” *Id.* The court described its rationale for refraining from imposing such

the statute of limitations accrues upon knowledge of the pertinent facts—not upon discovery of the relevant case law or legal theory.

2. *Journey's Account Statute*.—In *Basham v. Penick*,¹¹⁸ the court analyzed the circumstances in which the “Journey’s Account Statute”¹¹⁹ applies to save an otherwise time-barred lawsuit (which was originally filed in another improper jurisdiction) and held that “the timeliness of the original filing [in the wrong jurisdiction] is measured by [the subsequent, proper jurisdiction’s] statute of limitations, not that of the foreign jurisdiction in which [the] complaint was erroneously filed.”¹²⁰

In *Basham*, two parties—an Indiana resident and a Kentucky resident—were involved in an automobile accident.¹²¹ Two years after the date of the accident, the Kentucky resident filed a complaint in Kentucky state court, alleging negligence resulting in both personal and property injuries.¹²² The defendant—the Indiana resident—moved for and was granted a dismissal for lack of personal jurisdiction.¹²³ “At the time the Kentucky court dismissed [the] suit, the Indiana statute of limitations on personal and property injury actions [i.e., two years] had run.”¹²⁴

Months later, the Kentucky plaintiff filed a complaint against the Indiana

an affirmative duty as follows:

By now attempting to shift responsibility of his duty to be aware of the law, [the insured] would have us not only create a new burden on insurance companies to keep abreast of developments in claims that have been rejected already but which are still viable within the statute of limitations’ term, but also reward plaintiffs who fail to diligently research Indiana law within the statute of limitations term in order to timely bring a claim. This we will not do.

Id.

118. 849 N.E.2d 706 (Ind. Ct. App. 2006).

119. IND. CODE § 34-11-8-1 (2004). The Journey’s Account Statute states, in relevant part:

(a) This section applies if a plaintiff commences an action and:

(1) the plaintiff fails in the action from any cause except *negligence in the prosecution of the action*;

....

(b) If subsection (a) applies, a new action may be brought not later than

(1) three (3) years after the date of the determination under subsection (a);

....

and be considered a continuation of the original action commenced by the plaintiff.

Id. (emphasis added).

120. *Basham*, 849 N.E.2d at 711; *see also* *Cox v. Am. Aggregates Corp.*, 684 N.E.2d 193, 195 (Ind. 1997) (“[T]he [Journey’s Account Statute] enables an action dismissed for lack of personal jurisdiction in one state to be refiled in another state despite the intervening running of the statute of limitations.”).

121. *Basham*, 849 N.E.2d at 708.

122. *Id.*

123. *Id.*

124. *Id.*

defendant in Indiana state court, again alleging both personal and property damages.¹²⁵ The defendant moved for judgment on the pleadings, arguing that the action was time-barred.¹²⁶ The trial court granted the defendant's motion and the plaintiff appealed, arguing that the Journey's Account Statute applied "to save her otherwise time-barred action."¹²⁷

The "unique factual situation presented by the [*Basham*] case" results from the fact that in Kentucky, "the statute of limitations for injury to one's person is one year."¹²⁸ In *Basham*, the original complaint "was untimely filed at least in part according to the applicable statute of limitations of the foreign jurisdiction in which [it was] erroneously filed, but would have been timely filed according to the applicable statute of limitations under Indiana law."¹²⁹ The court in *Basham*, therefore, was required to decide "whether the timeliness of [the plaintiff's] complaint [was] resolved according to Kentucky law [where the claim was originally filed], or, conversely, according to Indiana law."¹³⁰

The court in *Basham* followed the analysis utilized by the Indiana federal district court in *Abele v. A.L. Dougherty Overseas, Inc.*,¹³¹ which found that a "plaintiff should be protected by the Journey's Account Statute because [the] original . . . [untimely] action would have been timely if filed in [the proper jurisdiction]."¹³² The court in *Basham* stated that "for purposes of the Journey's Account Statute, the timeliness of the original filing is measured by Indiana's statute of limitations, not that of the foreign jurisdiction in which a complaint was erroneously filed."¹³³ Thus, the court in *Basham* explained, the plaintiff's "personal injury claim, untimely filed in Kentucky, would have been timely had it been filed in Indiana."¹³⁴ Reasoning that the defendant "had timely notice, under applicable Indiana law, that [the plaintiff] intended to maintain her rights before the courts" and considering the "broad and liberal purpose of the Journey's Account Statute, and the Supreme Court's admonition that the statute not be narrowly construed," the court in *Basham* held as follows:

[U]nder the facts of this case, the timeliness of [the plaintiff's] original complaint [filed in Kentucky], for purposes of the Journey's Account Statute, is determined by Indiana's statute of limitations. [The plaintiff's] original claim for personal injuries, therefore, was timely, and in that respect did not fail for negligence in prosecution of the

125. *Id.*

126. *Id.*

127. *Id.* at 708-09.

128. *Id.* at 711 (citations omitted).

129. *Id.*

130. *Id.*

131. 192 F. Supp. 955 (N.D. Ind. 1961).

132. *Basham*, 849 N.E.2d at 711 (discussing *Abele*, 192 F. Supp. at 955).

133. *Id.*

134. *Id.* at 711-12.

action.¹³⁵

3. *Relation Back Doctrine*.—In *Crossroads Service Center, Inc. v. Coley*,¹³⁶ the court held that a plaintiff's amended complaint did not "relate back" to the date of the original complaint, because the new defendant added via the amendment—"a completely different corporation"—did not know of the claim until it received the amended complaint, "which was after the 120 days [after commencement of the action] had passed."¹³⁷ On December 24, 2002, the plaintiffs in *Coley* filed their original complaint, alleging premises liability for injuries incurred at a truck stop/service center on December 27, 2000.¹³⁸ Subsequently, the plaintiffs learned that the named defendant did not own the premises and that, in fact, the premises were owned by a completely different, unaffiliated entity.¹³⁹ On April 29, 2003, the plaintiffs filed their amended complaint naming the true owner of the premises as the defendant. The amended complaint was served on the new defendant on May 10, 2003.¹⁴⁰

The new defendant moved for summary judgment, alleging via affidavits of the defendant company's registered agent and its manager/accountant, that it had no knowledge of the claim until it was served with the amended complaint—i.e., 137 days after the original complaint was filed.¹⁴¹ Because the plaintiff "failed to designate any evidence which would contradict [the defendant's] assertions and would create a genuine issue of material fact necessary to defeat a motion for

135. *Id.* at 712. The court in *Basham* also rejected the defendant's argument that the plaintiff filed the original action in "bad faith" and "with knowledge of the lack of jurisdiction[.]" *Id.* at 712-13.

136. 842 N.E.2d 822 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1010 (Ind. 2006).

137. *Id.* at 826. Indiana Trial Rule 15(C) provides, in relevant part, as follows:

An amendment changing the party against whom a claim is asserted relates back if the . . . within one hundred and twenty (120) days of commencement of the action, the party to be brought in by amendment: (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (2) knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.

IND. TRIAL R. 15(C). Rule 15(C) was amended effective April 1, 2002 and "gives a party attempting to have their amended complaint relate back to their original complaint an additional 120 days in which to give notice of the institution of the action." *Coley*, 842 N.E.2d at 825 n.2 ("The prior version of the rule allowed relation back if the requirements were met 'within the period provided by law for commencing the action against him.'"). The court in *Coley* was unaware of any prior Indiana cases applying the revised Rule. *Id.* at 825.

138. *Coley*, 842 N.E.2d at 823. Because the plaintiffs' cause of action involved personal injuries, the applicable statute of limitations was two years. *Id.* at 824 (citing IND. CODE § 34-11-2-4 (2004)).

139. *Id.* at 823.

140. *Id.*

141. *Id.* at 825.

summary judgment[.]”¹⁴² the court in *Coley* held that the plaintiffs failed to establish the “third requirement of Trial Rule 15(C), and the amended complaint [could] not relate back.”¹⁴³

C. Mootness—Public Interest Exception

In *Jones v. Womacks*,¹⁴⁴ the plaintiff, an individual who *rented* property within a school district, brought an action against the county auditor, claiming that a statute governing petition and remonstrance procedures for building projects proposed by political subdivisions was unconstitutional.¹⁴⁵ Specifically, the plaintiff claimed that the petition/remonstrance procedure violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, because it “restricts the right to participate in the petition/remonstrance process to *owners* of real property living within the political subdivision.”¹⁴⁶ The parties entered into a “Stipulation in Lieu of Preliminary Injunction,” which provided that the plaintiff would be allowed to sign a petition or remonstrance, which would then be sealed and would remain sealed unless and until the procedure resulted in a tie.¹⁴⁷ After the process (which did not result in a tie) was completed, the parties filed cross-motions for summary judgment, the court denied the plaintiff’s motion and granted the defendant’s motion, and, on appeal, the State of Indiana intervened to address the constitutionality of the statute.¹⁴⁸ On appeal, however, the State of Indiana argued only that “the matter is moot and should not be addressed.”¹⁴⁹

Recognizing that the case was moot “[i]n the true sense of the word,”¹⁵⁰ the court in *Womacks* explained that “although moot cases are usually dismissed, Indiana courts have long recognized that a case may be decided on its merits under an exception to the general rule when the case involves questions of ‘great public interest.’”¹⁵¹ “Cases found to fall within this ‘public interest exception’ typically contain issues likely to recur.”¹⁵² The court in *Womacks* noted that “earlier cases from this court [erroneously] had declared that an additional element was required to resolve a moot case on its merits: that the case must be likely to evade review.”¹⁵³ In other words, a case need not be “likely to evade review” under Indiana’s public interest exception to the mootness doctrine,

142. *Id.* at 826.

143. *Id.*

144. 852 N.E.2d 1035 (Ind. Ct. App. 2006), *trans. granted*, (Ind. May 21, 2007).

145. *Id.* at 1036.

146. *Id.* (emphasis added).

147. *Id.* at 1038-39.

148. *Id.* at 1039-40.

149. *Id.* at 1040.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (discussing *In re Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991)).

which, according to the court in *Womacks* is less stringent than the federal standard.¹⁵⁴

Among other things, the State argued that the plaintiff “effectively was allowed to participate[,]” because he was allowed to sign a petition or remonstrance pursuant to the parties’ stipulation.¹⁵⁵ The court disagreed, stating that “what [the plaintiff] was allowed to do by filing his sealed signature with the trial court was akin to filing a provisional ballot.”¹⁵⁶ Analogizing the disputed procedure to an election, the court stated that “the fact that the election was not close enough to be changed by the provisional ballots would not alter that the voters in the subset were denied their right to actually participate in the election.”¹⁵⁷ According to the court in *Womacks*, the plaintiff “seeks the right to participate, not change the ultimate result.”¹⁵⁸

Distinguishing cases in which “challenges were brought regarding elections, but Indiana appellate courts dismissed the cases as moot where the elections had been completed before the appellate cases were decided[,]”¹⁵⁹ the court explained that the particular issue in those cases “was unlikely to repeat, and addressing the merits even under a public interest exception would have been of little use.”¹⁶⁰ The court concluded that “the issue before [it]—whether those who do not own real property may participate in the petition/remonstrance process—is of great public importance.”¹⁶¹ The court, therefore, exercised its discretion to address the appeal on its merits.¹⁶²

Ultimately, the court in *Womacks* found that the petition/remonstrance procedure at issue amounts to a “*de facto* election or referendum.”¹⁶³ As such, the court held that “the State may not limit the right to participate to only those who own real property within the political subdivision without a showing of a compelling state interest . . . [which] has not been made here.”¹⁶⁴

The Indiana Supreme Court has granted transfer in *Womacks*, but as of the date of this publication, a decision has not yet been rendered.

154. *Id.* The court in *Womacks* explained that the federal standard—premised on Article III of the United States Constitution, limiting the jurisdiction of federal courts to “actual cases and controversies”—is stricter than the Indiana standard. *Id.* (“[T]he Indiana Constitution contains no similar restraint.”).

155. *Id.* at 1041.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1043-44 & n.6.

160. *Id.* at 1044.

161. *Id.*

162. *Id.*

163. *Id.* at 1050.

164. *Id.* Recognizing that the case was moot and declining to “overstep [its] judicial role and attempt to re-draft [the statute,]” the court in *Womacks* stayed the effectiveness of its holding to allow the Indiana General Assembly an opportunity to “redraft or otherwise remedy the inadequacies of the [statute].” *Id.*

D. Res Judicata

1. *Claim Preclusion and Compulsory Counterclaims.*—In *Huber v. United Farm Family Mutual Insurance Co.*,¹⁶⁵ the plaintiff, a business owner, filed a complaint alleging breach of contract, breach of the duty of good faith and fair dealing and fraud against his insurer relating to the conduct of a prior appraisal proceeding conducted to resolve a fire damages claim.¹⁶⁶ Specifically, in connection with the prior appraisal proceeding, the parties were required to appoint an “umpire” to resolve any disputes regarding the appraisal.¹⁶⁷ The insurer filed a petition to appoint the umpire with the Montgomery Circuit Court.¹⁶⁸ The court appointed an umpire and, later, the plaintiff began to suspect that the umpire was not acting impartially.¹⁶⁹ An appraisal was issued, the appraisal proceeding was concluded and the plaintiff’s action against the insurer followed.¹⁷⁰

The trial court concluded that the plaintiff’s claims were barred by the doctrine of *res judicata*, because the claims “could have been brought in the previous proceeding.”¹⁷¹ On appeal, in reversing the trial court’s decision, the court in *Huber* explained that the plaintiff “is not barred from bringing those claims unless they were compulsory counterclaims in the earlier proceedings.”¹⁷² The court in *Huber* quoted Trial Rule 13, which distinguishes compulsory and permissive counterclaims, as follows:

[A party must raise] any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.¹⁷³

However, the court recognized that “a claim that accrues *after* a responsive pleading is not a compulsory counterclaim[.]”¹⁷⁴

Assuming the plaintiff (the business owner) was served in the prior appraisal proceeding on April 14, 2003, “and that a responsive pleading was required, [the plaintiff] had twenty days from that time to respond.”¹⁷⁵ Thus, any responsive

165. 856 N.E.2d 713 (Ind. Ct. App. 2006), *trans. denied*, (Ind. Feb. 22, 2007).

166. *Id.* at 715-16.

167. *Id.* at 715.

168. *Id.*

169. *Id.*

170. *Id.* at 715-16.

171. *Id.* at 716.

172. *Id.* (citing IND. TRIAL R. 13).

173. *Id.* at 716-17 (quoting IND. TRIAL R. 13).

174. *Id.* at 716 (emphasis added) (citing *Berkemeier v. Rushville Nat’l Bank*, 459 N.E.2d 1194, 1199 (Ind. Ct. App. 1984); *Hunter v. Milhous*, 305 N.E.2d 448, 452 (Ind. Ct. App. 1973)).

175. *Id.* at 717 (citing IND. TRIAL R. 6(C)).

pleading would have been due on May 5, 2003.¹⁷⁶ According to the plaintiff's affidavit, "he did not become concerned about [the umpire's] impartiality until June 20."¹⁷⁷ The court in *Huber* held that because the plaintiff's "claim did not exist at the time when a responsive pleading would have been due [in the prior matter] . . . it [was] not a compulsory counterclaim under Trial Rule 13."¹⁷⁸ As such, the claims were not "barred by the doctrine of *res judicata*."¹⁷⁹

2. *Successive Foreclosure Claims Not Barred by Res Judicata*.—In an apparent matter of first impression, the court in *Afolabi v. Atlantic Mortgage & Investment Corp.*¹⁸⁰ held that a second foreclosure action premised on subsequent defaults under a promissory note and mortgage was not barred by *res judicata*, where a prior foreclosure action, premised on separate, prior defaults, was dismissed for failure to prosecute.¹⁸¹ In *Afolabi*, the first foreclosure action was dismissed pursuant to Trial Rule 41(E) for failure to prosecute.¹⁸² After additional "defaults," a second foreclosure action was filed.¹⁸³ The defendant moved to dismiss, arguing that the Rule 41(E) dismissal of the previous foreclosure action, which was based on the same note and mortgage, was barred by the doctrine of *res judicata*.¹⁸⁴ The trial court denied the motion to dismiss and the defendant appealed.¹⁸⁵

The court in *Afolabi* explained that for claim preclusion to apply, four requirements must be met:

1. The former judgment must have been rendered by a court of competent jurisdiction;
2. The former judgment must have been rendered on the merits;
3. The matter now in issue was, or could have been, determined in the prior action; and
4. The controversy adjudicated in the former action must have been between the parties to the present suit or their privies.¹⁸⁶

In addition, "a dismissal with prejudice constitutes a dismissal on the merits."¹⁸⁷

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* The court in *Huber* also held that the *issues* raised by the plaintiff were not barred by *res judicata*, because the court in the first proceeding was "simply called upon to appoint an umpire." *Id.* The court was not asked to and "did not render any judgment as to [the umpire's] impartiality." *Id.* Because no "final judgment on the merits" was issued on the impartiality issue, issue preclusion did not apply. *Id.*

180. 849 N.E.2d 1170 (Ind. Ct. App. 2006).

181. *Id.* at 1175.

182. *Id.* at 1172.

183. *Id.*

184. *Id.* at 1172-73.

185. *Id.* at 1172.

186. *Id.* at 1173.

187. *Id.* (citing *Richter v. Asbestos Insulating & Roofing*, 790 N.E.2d 1000, 1002-03 (Ind. Ct.

Further, the court explained, “a dismissal with prejudice is conclusive of the rights of the parties and is *res judicata* as to any questions that might have been litigated.”¹⁸⁸

The court in *Afolabi* held that “the claim preclusion part of the doctrine of *res judicata* does not bar successive foreclosure claims, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first claim.”¹⁸⁹ The court explained that “the subsequent and separate alleged defaults under the note created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.”¹⁹⁰

Further, the court in *Afolabi* held that issue preclusion, or collateral estoppel, did not apply to bar the subsequent foreclosure action.¹⁹¹ The court described the law of issue preclusion as follows:

Issue preclusion, or collateral estoppel, bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in a subsequent lawsuit. . . . However, the former adjudication will only be conclusive as to those issues that were actually litigated and determined therein. Collateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument. In determining whether to allow the use of collateral estoppel, the trial court must engage in a two-part analysis: (1) whether the party in the prior action had a full and fair opportunity to litigate the issue and (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case.¹⁹²

The court held that “[b]ecause the [prior foreclosure] action was dismissed with prejudice pursuant to [Trial Rule 41(E)] for failure to prosecute the claim, no issue was actually litigated.”¹⁹³ Therefore, issue preclusion did not apply to bar the litigation of the second foreclosure action.¹⁹⁴

E. Motion to Intervene

In *Allstate Insurance Co. v. Keltner*,¹⁹⁵ the court clarified that a hearing is not required on a Trial Rule 24 petition to intervene:

It is true that in one opinion decided some time ago, this court held that although a party seeking intervention had not requested a hearing, the trial court committed reversible error by not holding a hearing on the

App. 2003)).

188. *Id.*

189. *Id.* at 1175.

190. *Id.*

191. *Id.* at 1176.

192. *Id.* at 1175-76.

193. *Id.* at 1176.

194. *Id.*

195. 842 N.E.2d 879 (Ind. Ct. App. 2006).

petition to intervene in light of the legal and factual questions in this case¹⁹⁶

In declining to rule that Rule 24 motions require a hearing, the court in *Keltner* noted that “nothing in Trial Rule 24 requires any type of hearing.”¹⁹⁷ Second, “the facts alleged in a petition to intervene must be taken as true and the decision on a motion to intervene turns on the sufficiency of the claim asserted.”¹⁹⁸ Third, the court reasoned that “allowing a party on appeal to request and obtain relief not asked of the trial court [*e.g.*, a hearing] would contravene the axiomatic principle that an argument or issue not presented to the trial court generally is waived.”¹⁹⁹ Finally, the court determined that, due to the “substantial briefing” of the relevant issues by the parties, “it does not appear . . . that a hearing was required to address any outstanding factual issues.”²⁰⁰ In other words, the trial court “was adequately informed on [the relevant] issues.”²⁰¹ Therefore, the court in *Keltner* concluded that no hearing was required on the “petition to intervene in the absence of a request by one of the parties to do so.”²⁰²

F. Discovery—Intentional Violation of Discovery Order as a Means to Immediate Appellate Review

In *Allstate Insurance Co. v. Scrogan*,²⁰³ the plaintiff moved to compel various discovery in connection with his bad faith action against his automobile insurer, resulting in a “hotly contested battle” over the requested discovery.²⁰⁴ Following an order compelling the production of documents that the insurer believed to be privileged, the insurer reiterated its objection, stating that it would “defer production of such protected documents that it believes should be protected by the request for a protective order until it has exhausted all avenues of appeal.”²⁰⁵ The trial court ultimately sanctioned the insurer for failing to comply with its discovery order and ordered it to pay \$10,000.²⁰⁶

The insurer then appealed the trial court’s order pursuant to Rule 14(A) of the Indiana Rules of Appellate Procedure, which “allows an interlocutory appeal as of right of orders requiring the payment of money.”²⁰⁷ The insured argued that

196. *Id.* at 882 (quoting *Lawyers Title Ins. Corp. v. C & S Lathing & Plastering Co.*, 403 N.E.2d 1156, 1160 (Ind. Ct. App. 1980)).

197. *Id.*

198. *Id.* (citing *United of Omaha v. Hieber*, 653 N.E.2d 83, 88 (Ind. Ct. App. 1995)).

199. *Id.* (citing *GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002)).

200. *Id.*

201. *Id.*

202. *Id.*

203. 851 N.E.2d 317 (Ind. Ct. App. 2006).

204. *Id.* at 319.

205. *Id.* at 320.

206. *Id.* at 321.

207. *Id.* “Through its appeal of the trial court’s imposition of sanctions, [the insurer] also

the court of appeals “should not consider the [merits or substance of the trial court’s discovery order] because [the insurer] intentionally engaged in misconduct, i.e., failing to comply with the trial court’s [order] in the hopes of being monetarily sanctioned, thus allowing an interlocutory appeal as of right.”²⁰⁸

The court in *Scroghan* explained that “[w]hile we do not condone the practice of intentionally violating discovery orders to obtain appellate review of those orders, we recognize that such a practice can act as an important ‘safety valve,’ which relieves parties from generally non-appealable discovery orders.”²⁰⁹ Recognizing that “no Indiana case law” has specifically addressed “the propriety of this method of obtaining [appellate] review,” the court in *Scroghan* noted that the Seventh Circuit Court of Appeals effectively explained it as follows:

Confining the right to get appellate review of discovery orders to cases where the party against whom the order was directed cared enough to incur a sanction for contempt is a crude but serviceable method, well established in case law, of identifying the most burdensome discovery orders and in effect waiving the finality requirements for them.²¹⁰

The court in *Scroghan* concluded that “while we certainly do not encourage parties to intentionally violate a discovery order so as to be sanctioned and thus obtain an interlocutory appeal as of right, we can see the narrow situations, such as this one, where such as strategy may be utilized.”²¹¹ The court recognized the limited options available to a party in the position of the insured in this case:

A party in [the insured’s] position has few options since complying with the court’s discovery order, proceeding through a trial, and ultimately winning on appeal would be a hallow victory indeed when the information sought to be protected would then already have been disclosed. In such situations, if a party is willing to incur possibly serious sanctions to obtain review of a discovery order, then the option should be available.²¹²

In short, according to the court in *Scroghan*, a party may intentionally violate a discovery order and, if a monetary sanction is imposed, obtain immediate appellate review of the interlocutory discovery order, including the “substance and merits” of the order.

request[ed] that [the court of appeals] review the underlying [d]iscovery [o]rder.” *Id.* at 322.

208. *Id.* at 322.

209. *Id.* (citing *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 726 F.2d 1150, 1157 (7th Cir. 1984)).

210. *Id.* (citing *Marrese*, 726 F.2d at 1157).

211. *Id.*

212. *Id.*

G. Judgment on the Pleadings

In *Fox Development, Inc. v. England*,²¹³ the court of appeals, deciding an apparent issue of first impression in Indiana, affirmed the trial court's order granting the defendants' Rule 12(C) motion for judgment on the pleadings, where the plaintiff—suing on an alleged oral contract—failed to anticipate the defendants' statute of frauds affirmative defense by pleading exceptions to the statute in its complaint.²¹⁴

In *England*, prospective purchasers of a home under construction expressed an interest in the home to the builder, but never executed a purchase agreement that had been prepared.²¹⁵ Nevertheless, the builder made improvements to the home based on the prospective purchasers' preferences.²¹⁶ The prospective purchasers subsequently informed the builder that they had purchased another home, the builder demanded \$10,000 in earnest money (which was provided in the unexecuted purchase agreement), the purchasers refused to pay and the builder sued.²¹⁷ The trial court granted the prospective purchasers' motion for judgment on the pleadings and the builder appealed, contending that the trial court should have treated the motion as one to dismiss under Rule 12(B)(6) or for summary judgment under Rule 56, as well as arguing the merits of the Rule 12(C) motion.²¹⁸

After concluding that the trial court properly treated the motion as one for judgment on the pleadings,²¹⁹ the court in *England* described the "test" to be applied in evaluating a Rule 12(C) motion:

The test to be applied when ruling on a Rule 12(C) motion is whether, in the light most favorable to the non-moving party and with every intendment regarded in his favor, the complaint is sufficient to constitute any valid claim. In applying this test, we may look only at the pleadings, with all well-pleaded material facts alleged in the complaint taken as admitted, supplemented by any facts of which the court will take judicial notice.²²⁰

213. 837 N.E.2d 161 (Ind. Ct. App. 2005).

214. *Id.* at 165-66.

215. *Id.* at 163.

216. *Id.*

217. *Id.*

218. *Id.* at 163-64.

219. *Id.* at 165. The court reasoned that neither party designated or relied on materials outside the pleadings and the "trial court did not give the parties notice that it would be treating the matter as one for summary judgment." *Id.* at 164 (citing IND. TRIAL R. 12(B)(8)) (noting that a trial court treating a motion to dismiss for failure to state a claim as one for summary judgment "shall" give the parties reasonable opportunity to present all pertinent material); *Kolley v. Harris*, 553 N.E.2d 164, 167 (Ind. Ct. App. 1990) (holding that grant of summary judgment was erroneous because trial court did not provide parties with notice that it intended to treat the motion as one for summary judgment)).

220. *Id.* at 165 (internal citation omitted).

The court agreed with the prospective purchasers' assertion that the builder "was required to plead exceptions to the statute of frauds [namely, part performance and promissory estoppel] in its complaint in order to survive a judgment on the pleadings."²²¹ Explaining that "[t]he statute of frauds does not govern the formation of a contract but only the enforceability of contracts that have been formed[,]"²²² the court in *England* concluded "that the parties entered into an oral contract for the sale of real estate."²²³ However, the purchasers "pleaded the statute of frauds as an affirmative defense with their answer."²²⁴ On appeal, the builder alleged that exceptions applied to remove its oral contract from the statute of frauds, but did not plead any exceptions in its complaint.²²⁵ Therefore, the issue was "whether [the builder] was required to plead an exception to the statute of frauds in order to survive a motion for judgment on the pleadings."²²⁶

The court explained that the "complaint alleged an oral contract for the sale of real property, which on its face is unenforceable under the statute of frauds."²²⁷ The court stated that "it was incumbent upon [the builder] to anticipate in the complaint, or to meet in an amended complaint, the [prospective purchasers'] affirmative defense that the breach of contract claim was barred by the statute of frauds."²²⁸ Therefore, to overcome the statute (and the motion for judgment on the pleadings), "the complaint or an amended complaint should have alleged exceptions to the statute of frauds in order to survive a motion for judgment on the pleadings."²²⁹ The court of appeals held "that the trial court did not err when it granted judgment on the pleadings in favor of the [prospective purchasers]."²³⁰

H. Summary Judgment

1. *Summary Judgment Prior to Class Certification.*—In *Reel v. Clarian Health Partners, Inc.*,²³¹ the court held as a matter of first impression that "Trial Rule 23 does not preclude [a] trial court from hearing [a defendant's] motion for summary judgment before addressing the certification of the class."²³² In *Reel*,

221. *Id.*

222. *Id.* (citing *Dupont Feedmill Corp. v. Standard Supply Corp.*, 395 N.E.2d 808, 810 (Ind. Ct. App. 1979)).

223. *Id.* at 166.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. 855 N.E.2d 343 (Ind. Ct. App. 2006). The *Reel* decision was rendered October 18, 2006—just outside the current survey period. The ruling is included herein given its immediate potential impact on class action litigation.

232. *Id.* at 356 (citing *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 214 (2d Cir.

the defendant moved for summary judgment before a class certification determination was reached.²³³ The trial court set a hearing on the defendants' summary judgment motion and the plaintiffs responded by filing, among other things, a motion to certify the trial court's order setting the matter for a summary judgment hearing for immediate interlocutory appeal and to stay proceedings pending certification and appeal.²³⁴ The trial court certified the interlocutory order for immediate appeal and stayed proceedings, and the court of appeals accepted jurisdiction.²³⁵

On appeal, the "sole issue [was] whether the trial court erred by setting a hearing on [the defendant's] motion for summary judgment before addressing class certification."²³⁶ The court, recognizing that because "Trial Rule 23 is based upon Federal Rule of Civil Procedure 23," and "it is appropriate for [the court] to look at federal court interpretations of the federal rule when applying the Indiana rule[,]""²³⁷ the court in *Reel* analyzed several federal court decisions that had evaluated the issue.²³⁸

1987)).

233. *Id.* at 345.

234. *Id.*

235. *Id.* at 346.

236. *Id.*

237. *Id.* at 349 (citing *In re Tina T.*, 579 N.E.2d 48, 55 (Ind. 1991)).

238. *See id.* at 349-55 (discussing *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984) (concluding that "[u]nder the proper circumstances—where it is more practicable to do so and where the parties will not suffer significant prejudice—the district court has discretion to rule on a motion for summary judgment before it decides the certification issue"); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 762 (3d Cir. 1974) (stating that "where [a defendant] . . . is willing to run the risk that the determination of liability, if he loses, will be given effect in favor of the class, with notice in the event of such determination, the district court must seriously consider that alternative, and should, absent other compelling circumstances, pursue that course"); *Ahne v. Allis-Chalmers Corp.*, 102 F.R.D. 147, 151 (E.D. Wis. 1984) (recognizing that "while the general rule against pre-certification review of the merits of a case remains the touchstone for resolving disputes like the present, the courts have carved out a limited exception for those defendants willing to forego the protections attendant on early determination of the class issue"); *Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1382 (D.C. Cir. 1980) (finding that "a defendant may waive the protections Rule 23(c) offers and elect to have the merits decided before the class certification question and before notice is sent to the class when, as here, the defendant moves for summary judgment before resolution of the certification issue"); *Haas v. Pittsburgh Nat'l Bank*, 381 F. Supp. 801, 802-06 (W.D. Pa. 1974) (holding that "a district court may pass upon a motion for summary judgment prior to passing upon a motion for class determination or requiring that notice be sent to an already certified class")). The court in *Ahne* explained the risks and benefits of the "limited exception" as follows:

That exception . . . allows the defending party to exercise its option to waive the safeguard of *res judicata* implicit in Rule 23's requirement that the class question be addressed "[a]s soon as practicable after the commencement of an action." The risk to the defendant is, of course, that if he loses on the liability issue, that result will be given

The court in *Reel* stated that it found the reasoning of the federal court decisions “persuasive and applicable to this case.”²³⁹ The court explained:

[w]hen [the defendant] moved for summary judgment, it abandoned reliance on the preclusive effect of the judgment with respect to absent members of the class and cannot complain about either the treatment of the case as an individual action or the one way intervention that will result if the class should be certified at a later time. If the trial court grants [the defendant’s] motion for summary judgment, [the defendant] is not protected by res judicata from suits by potential class members. If the trial court denies [the defendant’s] motion for summary judgment, the [plaintiffs] could still seek certification of the class.²⁴⁰

The Indiana Court of Appeals affirmed the trial court’s order and set a hearing on the defendant’s motion for summary judgment prior to a class certification determination.²⁴¹

2. *Designation of Evidence in Opposition to Multiple Motions.*—In *Rood v. Mobile Lithotripter of Indiana*,²⁴² the court ruled—in opposition to one of two co-defendants’ summary judgment motions—that the non-moving plaintiff could not rely on evidentiary designations he filed in opposition to the second of the co-defendants’ motions to avoid the entry of summary judgment on the first defendant’s motion, in response to which no designations were timely filed.²⁴³

The plaintiff in *Rood* was injured in October 1999 “as he was transported into a mobile lithotripsy facility to treat kidney stones.”²⁴⁴ The plaintiff filed his claim with “the medical review panel[, which] unanimously concluded that neither the anesthesiologist, . . . nor [the hospital] failed to meet the applicable standard of care.”²⁴⁵ Notwithstanding the adverse medical review panel opinion, the plaintiff filed his complaint alleging negligence against both the anesthesiologist and the hospital.²⁴⁶

“The hospital filed a motion for summary judgment [premised] on the review panel’s [opinion].”²⁴⁷ The anesthesiologist filed a separate summary judgment motion days later.²⁴⁸ The plaintiff filed a timely response to the

effect as to a class of yet undefined numbers and composition; if he wins, he may still face subsequent prosecution by other potential class members whose claims might be barred only under the limited scope of the stare decisis doctrine.

Ahne, 102 F.R.D. at 151.

239. *Reel*, 855 N.E.2d at 355.

240. *Id.* at 355-56 (internal citations omitted).

241. *Id.* at 356.

242. 844 N.E.2d 502 (Ind. Ct. App. 2006).

243. *Id.* at 508.

244. *Id.* at 504.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

anesthesiologist's summary judgment motion, including certain "designated evidence in support of his opposition to summary judgment."²⁴⁹

Approximately two weeks later, the hospital sent a letter to counsel for the plaintiff, asking him to sign an agreed summary judgment entry due to the plaintiff's alleged failure to file a "specific response to [the hospital's] motion for summary judgment."²⁵⁰ The plaintiff proceeded to file a "designation of evidence in opposition to [the hospital's] motion for summary judgment[,] . . . [which] included the same evidence previously designated against [the anesthesiologist]."²⁵¹ The hospital filed a motion to strike the plaintiff's designation as untimely.²⁵² The trial court granted both the hospital's motion to strike and its motion for summary judgment, ruling that the plaintiff "failed to advance any expert testimony to contradict the opinion of the medical review panel."²⁵³

On appeal, the plaintiff argued that its designations in response to the anesthesiologist's summary judgment motion should have been considered in opposition to the hospital's summary judgment motion.²⁵⁴ The *Rood* court rejected the plaintiff's argument, explaining that parties must "strictly comply with the designated evidentiary matter requirement [of Rule 56(H)]."²⁵⁵ Because the plaintiff failed to timely designate specific evidence in opposition to the hospital's summary judgment motion, the *Rood* court held that the plaintiff did not satisfy the requirements of Trial Rule 56.²⁵⁶

In short, the plaintiff's "designation of evidence in opposition to [the anesthesiologist's] separate motion for summary judgment [was] simply insufficient to serve as a designation of evidence in opposition to [the hospital's] motion for summary judgment."²⁵⁷

3. *Designation of "Pleadings" Insufficient to Oppose Summary Judgment.*—In *McDonald v. Lattire*,²⁵⁸ the court ruled that allegations in a non-movant's pleadings did not constitute "designated evidence" sufficient to oppose a motion for summary judgment.²⁵⁹ In particular, the plaintiff alleged negligence-based claims against the defendant in connection with an automobile accident.²⁶⁰ The defendant moved for summary judgment on the issue of whether he had to

249. *Id.*

250. *Id.* at 506.

251. *Id.*

252. *Id.*

253. *Id.* (citation omitted)

254. *Id.* at 507 (arguing that "the trial court improperly allowed form to control over substance" in that the response to the anesthesiologist's motion was intended to be a response to both summary judgment motions—i.e., that "this was simply a captioning error").

255. *Id.*

256. *Id.* at 508.

257. *Id.*

258. 844 N.E.2d 206 (Ind. Ct. App. 2006).

259. *Id.* at 215-16.

260. *Id.* at 208.

“maintain a proper lookout” in connection with the incident and, if he did, whether he breached that duty.²⁶¹

In opposition to the defendant’s summary judgment motion, the plaintiff “submitted no additional evidence.”²⁶² Instead, the plaintiff relied “upon her complaint, which she asserts was designated by [the defendant].”²⁶³ According to the court in *McDonald*, “allegations” contained in a complaint do not constitute “testimony, affidavits, sworn statements, or evidence of any kind.”²⁶⁴ The court explained:

[O]nce a movant has designated evidence to support a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law, the nonmovant may not rest upon the mere allegations of her pleadings; instead, she must designate to the trial court each material issue of fact which that party asserts precludes entry of summary judgment *and the evidence relevant thereto*.²⁶⁵

According to the *McDonald* court, the non-moving party “should have sought and submitted sworn affidavits from [its principals] if [it] wished to designate their statements as evidence of a genuine issue of material fact precluding summary judgment.”²⁶⁶

4. “New” Evidence on Reconsideration.—In *Liggett v. Young*,²⁶⁷ the court refused to consider new evidence offered by a third party plaintiff on “reconsideration” of a prior order granting partial summary judgment in favor of the third party defendant.²⁶⁸ The court rejected the third party plaintiff’s argument that he “was unable to introduce [the new] evidence at the partial summary judgment stage because the [third party defendants], who had all the relevant information, filed a motion for partial summary judgment before the information was revealed in discovery.”²⁶⁹ The court noted that the third party defendants “did not file their motion immediately after the [third party plaintiff] filed his complaint; to the contrary, they waited over two years to seek partial

261. *Id.* at 214.

262. *Id.*

263. *Id.*

264. *Id.* at 215.

265. *Id.* (emphasis in original) (citations omitted).

266. *Id.* The *McDonald* court also stated that the plaintiff was “free to depose [the defendant] in the hopes of uncovering contradictory testimony.” *Id.* at 216. Instead, “there was a total absence of evidence, expert or otherwise, that [the defendant] failed to maintain a proper lookout.” *Id.* According to the court, whether someone maintained a proper lookout under any set of circumstances would always create a question of fact. *Id.* Instead, “this particular case falls within the small percentage of negligence cases appropriately decided on summary judgment.” *Id.*

267. 851 N.E.2d 968 (Ind. Ct. App. 2006), *trans. granted*, (Ind. Mar. 1, 2007).

268. *Id.* at 975.

269. *Id.* at 974.

summary judgment.”²⁷⁰ The court admonished that the third party plaintiff “could—and should—have sought an extension to conduct discovery, but he chose not to do so.”²⁷¹ The court explained its reasoning as follows:

It was incumbent upon [the third party plaintiff] to provide evidence to defeat summary judgment, and if he had no such evidence, then he should have requested time to conduct discovery to develop that evidence. Having failed to do so, he may not apply this evidence retrospectively, regardless of its “importance” to his case. He is not entitled to a second bite of this apple.²⁷²

The court in *Liggett* explained that “Trial Rule 56(F) provides the procedure to obtain additional time to develop evidence to oppose a motion for summary judgment”²⁷³ and “no authority . . . would allow a party to designate ‘newly developed evidence’ in an effort to circumvent the specific requirements of [Trial Rule 56].”²⁷⁴ According to the court, “[t]o allow a party to attack a partial summary judgment after it has been granted by designating further evidence and raising additional issues would effectively nullify the provisions of Trial Rule 56.”²⁷⁵

The Indiana Supreme Court has granted transfer in *Liggett*, but as of the date of this publication, a decision has not yet been rendered.

5. *Alteration of Rule 56 Deadlines.*—In *Logan v. Royer*,²⁷⁶ the court of appeals held that the trial court abused its discretion when it shortened the time limit for a party to respond to a motion for summary judgment, pursuant to Trial Rule 56(I), *before* the summary judgment motion had been filed.²⁷⁷ Just over one month before the trial of a will contest, the decedent’s son filed a motion to shorten the time allowed to respond to a summary judgment motion, pursuant to Rule 56(I).²⁷⁸ The trial court granted the motion, allowing the non-moving party fifteen days from the date of filing to respond to the motion.²⁷⁹ Subsequently,

270. *Id.*

271. *Id.*

272. *Id.* (citing *Harris v. Chern*, 33 S.W.3d 741, 745 (Tenn. 2000)).

273. *Id.* at 975 (citation omitted).

274. *Id.* (citation omitted)

275. *Id.* (citation omitted). Ultimately, the court of appeals concluded that “the trial court properly found that it could not consider new evidence” and affirmed the trial court’s entry of partial summary judgment on the substantive issues involved. *Id.* at 978.

276. 848 N.E.2d 1157 (Ind. Ct. App. 2006).

277. *Id.* at 1161 (emphasis added).

278. *Id.* at 1159. Apparently, the Rule 56(I) motion was filed before the motion for summary judgment was filed in an attempt to save the moving party the time and expense of preparing and filing a motion that would not be heard and ruled upon before trial if the 56(I) motion was denied. *See id.* at 1162-63 (concurring opinion) (arguing that, under the circumstances and “faced with a difficult decision[,]” the trial court did not abuse its discretion in granting the pre-summary judgment filing Rule 56(I) motion).

279. *Id.* at 1159.

following certain disputes relating to discovery and other matters, the trial court granted the son's motion for summary judgment.²⁸⁰

The *Logan* court stated that “[a]lthough [Rule 56(I)] does not specify when a [Rule 56(I)] motion may be filed, it is axiomatic that before the time limits to respond to a motion for summary judgment can be altered, a motion for summary judgment must be filed.”²⁸¹ According to the court, “[w]ithout the motion for summary judgment before it, the trial court could not have properly evaluated [the] 56(I) motion to determine whether alteration of time was appropriate.”²⁸² The court reasoned that “[f]or a case, or an issue in a case, to be ripe for review, the facts must ‘have developed sufficiently to permit an intelligent and useful decision to be made.’”²⁸³ According to the court in *Logan*, “[w]hen a [Rule 56(I)] motion is filed before the motion for summary judgment, there are ‘no actual facts present upon which the Court can make a decision.’”²⁸⁴

6. *Summary Judgment Hearing by Cellular Phone.*—In *Bruno v. Wells Fargo Bank*,²⁸⁵ the court held that a party's due process rights were not violated when his attorney was required to participate in the hearing via cellular phone due to confusion over the start time of a summary judgment hearing.²⁸⁶ In *Bruno*, a “clerical error” led the non-movant's counsel to believe that the summary judgment hearing began at 9:30 a.m.,²⁸⁷ but movant's counsel was present on time at 8:30 a.m.²⁸⁸ When non-movant's counsel did not appear by 8:30 a.m., the trial court contacted counsel on her cellular phone.²⁸⁹ The “hearing” was conducted and both parties presented arguments, although apparently no transcript was created.²⁹⁰

Concluding that the summary judgment non-movant's due process rights were not violated by conducting the hearing via cellular phone, the court in *Bruno* noted that the non-movant “was given notice of the hearing, as well as an opportunity to present arguments to the trial court, albeit by cellular phone.”²⁹¹ The *Bruno* decision does not clarify whether the “clerical error” leading to the

280. *Id.*

281. *Id.* at 1160.

282. *Id.* For example, the court noted, “without the motion for summary judgment before it, a trial court would be unable to consider the factual and legal complexity of the issues raised in the motion and make an informed decision as to whether the issues could be adequately addressed in a compressed time frame.” *Id.* at 1168 n.9.

283. *Id.* at 1160-61 (quoting BLACK'S LAW DICTIONARY 1328 (7th ed. 1999)).

284. *Id.* at 1161.

285. 850 N.E.2d 940 (Ind. Ct. App. 2006).

286. *Id.* at 949.

287. *Id.* at 948.

288. *Id.*

289. *Id.* at 948-49. There was conflicting evidence regarding whether the trial court gave counsel the option of rescheduling the hearing rather than proceeding with the hearing via cellular phone. *Id.* at 949.

290. *Id.* at 949.

291. *Id.*

confusion regarding the start time of the summary judgment hearing was that of the court's clerk or that of counsel for the non-movant.²⁹² Arguably, a clerical error by a trial court or its clerks should justify an exception to the otherwise strict mandates of procedural rules, to the extent the error reasonably resulted in a failure to adhere to a procedure or deadline. The *Bruno* decision also raises implications regarding the definition of a "hearing," as that term is used in Rule 56.

I. Motion to Set Aside Default Judgment

In *Anderson v. State Auto Insurance Co.*,²⁹³ the court of appeals affirmed the trial court's ruling that the defendants were not entitled to relief from a default judgment when they failed to make a proper showing of a "meritorious defense."²⁹⁴ In reaching its decision, the court in *Anderson* clarified that case law had not "abrogated" the "meritorious claim or defense" requirement of Trial Rule 60(B)(1), as argued by the defendants.²⁹⁵ Trial Rule 60(B)(1) provides, in relevant part, as follows:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default . . . , including a judgment by default, for the following reasons: (1) mistake, surprise, excusable neglect. . . . A movant filing a motion for reason (1) must allege a meritorious claim or defense.²⁹⁶

The court explained that "[p]rima facie evidence [of a meritorious defense] . . . was not presented at the hearing [on the motion to set aside the default judgment]."²⁹⁷ In fact, the court found from a review of the hearing transcript that "there was no such evidence before the trial court."²⁹⁸ The court of appeals held that (1) case law has not abrogated the requirement of establishing a

292. See *id.* at 944 (stating passively that "due to confusion concerning the time of the hearing, [non-movant's] counsel participated by cellular phone").

293. 851 N.E.2d 368 (Ind. Ct. App. 2006).

294. *Id.* at 372.

295. *Id.* at 370-72 (discussing *Dep't of Natural Res. v. Van Keppel*, 583 N.E.2d 161, 162 (Ind. Ct. App. 1991); *Bross v. Mobile Home Estates, Inc.*, 466 N.E.2d 467, 469 (Ind. Ct. App. 1984); *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1258 (Ind. Ct. App. 1999); *Nwannunu v. Weichman & Assoc.*, 770 N.E.2d 871, 879 (Ind. Ct. App. 2002)). As an initial matter, the court in *Anderson* rejected the defendants' argument that the court of appeals' review should be *de novo*, because "they [were] attacking the trial court's legal conclusion—that a meritorious defense is absolutely required to be shown before a default judgment may be set aside." *Id.* at 370. In finding that the appropriate standard of review is abuse of discretion, the court explained that "the trial court's discretion is broad in cases involving setting aside default judgments because of the unique factual background of each case." *Id.*

296. *Id.* at 370 (quoting IND. TRIAL R. 60(B)(1)).

297. *Id.* at 371.

298. *Id.*

meritorious defense in addition to excusable neglect in connection with a Rule 60(B)(1) motion to set aside a default judgment, and (2) “the trial court did not err by concluding that [the defendants] were not entitled to relief for failure to make a showing of a meritorious defense.”²⁹⁹

J. Nunc Pro Tunc Orders

In *Brimhall v. Brewster*,³⁰⁰ the court addressed whether “a *nunc pro tunc* order was properly used to set aside the dismissal of the [plaintiffs’] complaint.”³⁰¹ At the trial court level, the plaintiffs’ complaint was dismissed *with prejudice*³⁰² pursuant to Trial Rule 41(E).³⁰³ Almost one month later, despite the order dismissing the complaint, the plaintiffs filed a verified application for default judgment, which, after multiple attempts by at perfecting service of process, was granted and entered by the trial court.³⁰⁴ Apparently, due to a

299. *Id.* at 372; *see also* *Ferguson v. Stevens*, 851 N.E.2d 1028, 1031 (Ind. Ct. App. 2006) (“A prima facie showing of a meritorious defense is evidence that, if credited, demonstrates that a different result would be reached if the case were retried on the merits and that it is unjust to allow the default to stand. It is one that will prevail until contradicted and overcome by other evidence.”). The court in *Ferguson* found that the defendant’s testimony at the hearing on her motion to set aside was sufficient to satisfy her burden of demonstrating a “meritorious defense” under Rule 60(B). *Id.* at 1031-32.

300. 835 N.E.2d 593 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1005 (Ind. 2006), *appeal after remand*, 864 N.E.2d 1148 (Ind. Ct. App. 2007).

301. *Id.* at 594.

302. The trial court’s dismissal order did not specify whether it was being entered “with prejudice” or “without prejudice.” *Id.* at 597. Trial Rule 41(E) provides, however, that unless otherwise specified, a Rule 41(E) dismissal, “other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits. Clearly, this means that unless the trial court indicates that the dismissal is without prejudice, it must be deemed to be with prejudice.” *Id.* (citing *Patton Elec. Co., Inc. v. Gilbert*, 459 N.E.2d 1192, 1194 (Ind. Ct. App. 1984)). The court in *Brewster* concluded that because “the order did not indicate that the dismissal was without prejudice[,] . . . it must be deemed that the order . . . was a dismissal with prejudice.” *Id.*

303. *Id.* at 595 (citing IND. TRIAL R. 41(E)). The court in *Brewster* noted that

[i]n the past this process [of a court setting matters *sua sponte* for a Rule 41(E) hearing] was often referred to as a call of the docket and was for the purpose of determining the status of inactive cases. Depending upon the circumstances the court may set a trial date, grant continuances, or dismiss the case.”

Id. at 595 n.3. Likewise, historically, a defendant’s motion to dismiss pursuant to Rule 41(E) was “more likely to prompt a plaintiff to take action than it [was] to dispose of the case.” Michael A. Dorelli, *Recent Developments in Indiana Civil Procedure*, 38 IND. L. REV. 920, 946 (2005) (stating that the Indiana Court of Appeals’ decision in *Lee v. Pugh*, 811 N.E.2d 881 (Ind. Ct. App. 2004), “provided a reminder that Rule 41(E) dictates the consequences of a plaintiff’s failure to pursue a case, and that the court of appeals will question the trial court’s decision [dismissing a case under Rule 41(E)] only if it finds an abuse of discretion”).

304. *Brewster*, 835 N.E.2d at 595-96.

“computer error,” the trial court did not realize the case had been dismissed until more than one year later.³⁰⁵ Upon realization of the “computer error,” the trial court issued two *nunc pro tunc* orders, providing, in essence, that (1) the Rule 41(E) dismissal was *without* prejudice, and (2) setting aside the dismissal.³⁰⁶

On appeal, the defendants argued that when the trial court dismissed the complaint pursuant to Rule 41(E), the dismissal was “with prejudice,” and, as such, it “could not be reinstated without the filing of a Trial Rule 60(B) motion.”³⁰⁷ Further, the defendants argued that “even though the [plaintiffs] filed a motion for default judgment, the trial court could not use a *nunc pro tunc* entry to amend the dismissal order.”³⁰⁸ The court of appeals agreed and reversed the trial court’s rulings.³⁰⁹

Practitioners do not frequently encounter situations in which a *nunc pro tunc* entry is the appropriate relief or remedy. The court of appeals’ decision in *Brewster* defined the unique relief and described the circumstances in which it should be allowed:

A *nunc pro tunc* order is “an entry made *now* of something which was actually previously done, to have effect as of the former date.” A *nunc pro tunc* entry may be used to either record an act or event not recorded in the court’s order book or to change or supplement an entry already recorded in the order book. The purpose of a *nunc pro tunc* order is to correct an omission in the record of action really had but omitted through inadvertence or mistake. However, the trial court’s record must show that the unrecorded act or event actually occurred.³¹⁰

In other words, the trial court cannot utilize a *nunc pro tunc* entry to correct a mistake recognized in hindsight.³¹¹ In addition, a “written memorial must form the basis for establishing the error or omission to be corrected by the *nunc pro tunc* order.”³¹² The court in *Brewster* explained that the requisite supporting written material must meet four requirements. Namely, it:

(1) must be found in the records of the case; (2) must be required by law to be kept; (3) must show action taken or orders or rulings made by the court; and (4) must exist in the records of the court contemporaneous

305. *Id.* at 596.

306. *Id.*

307. *Id.* (“A dismissal without prejudice may be set aside for good cause shown and within a reasonable time. On the other hand, a dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B).”).

308. *Id.*

309. *Id.* at 595.

310. *Id.* at 597 (citations omitted).

311. *Id.* (“A *nunc pro tunc* entry can not be used as the medium whereby a court can change its ruling actually made, however erroneous or under whatever mistakes of law or fact such ruling may have been made.”) (quoting *Harris v. Tomlinson*, 30 N.E. 214, 216 (Ind. 1892)).

312. *Id.* (citing *Cotton v. State*, 658 N.E.2d 898, 900 (Ind. 1995)).

with or preceding the date of the action described.³¹³

In *Brewster*, the court concluded that the trial court's action of "deeming the dismissal to be without prejudice and allowing the proceedings to continue" could not be validated, despite the appellate court's "sympathetic" view toward the "trial court's attempt to rectify an apparent error."³¹⁴ The court explained the rationale behind its "reluctant" decision to uphold the "written memorial" requirement as follows:

[H]uman memory and recall is not perfect and some times will fail. Thus, a written memorandum made at the time ensures a more accurate basis for the later entry than does a mere recollection which may be dimmed by the passage of time and colored or altered by intervening events.³¹⁵

The court in *Brewster* held that the trial court "erred in entering the *nunc pro tunc* order which deemed the dismissal to be without prejudice in order to validate the later proceedings."³¹⁶ All rulings made after the date of the order dismissing the plaintiffs' complaint with prejudice were invalidated, "including the default judgment entered in favor of the [plaintiffs] on their claim."³¹⁷

K. Bifurcation of Trial

In *Jamrosz v. Resource Benefits, Inc.*,³¹⁸ the court held that the defendant failed to show "good cause for bifurcating the issues of liability and damages [at trial]."³¹⁹ The bifurcation of issues of liability and damages is governed by Trial Rule 42(C), which provides as follows: "The Court upon its own motion or the motion of any party for good cause shown may allow the cause to be tried and submitted to the jury in stages or segments including, but not limited to, bifurcation of claims or issues of compensatory and punitive damages."³²⁰ The court in *Jamrosz* explained that "[w]hile the avoidance of prejudice is a more than sufficient reason for a separate trial, a separate trial should not be granted solely upon the moving party's speculation that it might be prejudiced by certain testimony."³²¹

[W]hile the separation of trials can result in judicial economy when the

313. *Id.* (quoting *Stowers v. State*, 363 N.E.2d 978, 983 (Ind. 1977)).

314. *Id.*

315. *Id.* at 598.

316. *Id.*

317. *Id.* The court in *Brewster*, apparently recognizing some injustice in its result, gratuitously noted that "[i]t may well be appropriate for our Supreme Court to revisit the procedural matters presented by cases such as this and to effect some fine tuning of the law." *Id.*

318. 839 N.E.2d 746 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1011 (Ind. 2006).

319. *Id.* at 763.

320. *Id.* at 761 (quoting IND. TRIAL R. 42(C)).

321. *Id.* at 761-62 (citing *Frito-Lay, Inc. v. Cloud*, 569 N.E.2d 983, 990 (Ind. Ct. App. 1991)).

defendant prevails on the issue of liability (by obviating the need for a trial on damages), the defendant must first convince the court that it has a persuasive argument on the question of liability in order to justify the potential risk and expense of two trials.³²²

The court in *Jamrosz* found that “the issues of damages and liability are not intertwined in this case.”³²³ However, the court stated that “the proof of damages was not complicated and costly, and [the defendant] did not present an argument that judicial economy would have been served by bifurcation because he had a strong defense on the liability claim.”³²⁴ Therefore, even though the plaintiffs may not have been prejudiced by bifurcation, the court concluded that the defendant failed to show good cause for bifurcating the issues of liability and damages.³²⁵

L. Arbitration

1. *Validity of Arbitration Provision.*—In *Precision Homes of Indiana, Inc. v. Pickford*,³²⁶ the court of appeals held that an arbitration provision contained in a residential construction agreement was neither procured by fraud nor unconscionable.³²⁷ Recognizing that both the federal and state arbitration statutes favor “enforcement of agreements to arbitrate[,]”³²⁸ the court concluded first that the arbitration provision at issue was not procured by fraud as a result of a misstatement of applicable law within the provision.³²⁹ Specifically, the arbitration provision “substantively altered the statement required under [section 32-27-3-12 of the Indiana Code] by changing the word ‘lawsuit’ from the statute to the word ‘arbitration’ in the [c]ontract.”³³⁰ The court explained that, “[i]n general, a misstatement of the law cannot form the basis of fraud because everyone is presumed to know the law, and, therefore, the allegedly defrauded party cannot justifiably have relied on the misstatements.”³³¹ Noting that the plaintiffs were represented by counsel in connection with the negotiation of the relevant contract, the court concluded that “[t]he [plaintiffs] had no right to rely on [the defendant’s] statements regarding the law and therefore did not establish

322. *Id.* at 762 (quoting *Frito-Lay*, 569 N.E.2d at 990) (internal citation omitted).

323. *Id.* at 763.

324. *Id.*

325. *Id.*

326. 844 N.E.2d 126 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 586 (Ind. 2006).

327. *Id.* at 132.

328. *Id.* at 131 (quoting 9 U.S.C. § 1 (2000); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); IND. CODE § 34-57-2-1 (2004); *Homes By Pate, Inc. v. DeHann*, 713 N.E.2d 303, 306 (Ind. Ct. App. 1999)).

329. *Id.*

330. *Id.*

331. *Id.* at 132. (citing *Am. United Life Ins. Co. v. Douglas*, 808 N.E.2d 690, 703 (Ind. Ct. App. 2004)).

that the arbitration agreement was fraudulently induced.”³³²

Regarding the argued unconscionability of the arbitration provision, the court noted “that to be unconscionable, a contract ‘must be such as no sensible man not under delusion, duress or in distress would make, and such as no honest and fair man would accept.’”³³³ In reaching its conclusion that the provision at issue was not unconscionable, the court in *Precision Homes* reasoned that the plaintiffs were “represented by counsel during the contract negotiations[,] . . . [they] and their counsel had every opportunity to read and understand the arbitration agreement[,] . . . and if they entered into the contract without knowledge of its terms, that was of their own doing.”³³⁴

2. *Prohibitive Costs of Arbitration.*—In *Roddie v. North American Manufactured Homes, Inc.*,³³⁵ the plaintiffs argued, *inter alia*, that the arbitration agreement was “unconscionable because they [could not] afford the arbitration process.”³³⁶ The court quoted the United States Supreme Court’s rule of law on the issue as follows: “[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”³³⁷

Although the plaintiffs “introduced evidence of their monthly budget[,]”³³⁸ they offered “no evidence of the potential cost to [them] of arbitration.”³³⁹ Again quoting the United States Supreme Court, the court in *Roddie* concluded that “the risk that the [plaintiffs] ‘would be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement’ because there is no evidence of the cost of arbitration to them.”³⁴⁰

3. *Deadline for Seeking Confirmation of Arbitration Award.*—In *MBNA America Bank v. Rogers*,³⁴¹ the court held that “section 9 of the [Federal Arbitration Act (the “FAA”)]³⁴² imposes a one-year statute of limitations on the filing of a motion to confirm an arbitration award under the FAA.”³⁴³ Section 9

332. *Id.*

333. *Id.* (citing *Progressive Constr. & Eng’g Co. v. Ind. & Mich. Elec. Co.*, 533 N.E.2d 1279, 1286 (Ind. Ct. App. 1989)).

334. *Id.* The court in *Precision Homes* proceeded to find that the plaintiffs’ claims, including claims of assault, battery, and false imprisonment, were within the scope of the arbitration provision. *Id.* at 132-133.

335. 851 N.E.2d 1281 (Ind. Ct. App. 2006).

336. *Id.* at 1285.

337. *Id.* (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000)).

338. *Id.*

339. *Id.*

340. *Id.* (quoting *Green Tree*, 531 U.S. at 91). The court in *Roddie* also rejected the plaintiffs’ argument that the contract was illusory and it found that the disputed matter was “the type of claim that the parties agreed to arbitrate.” *Id.* at 1286-87.

341. 835 N.E.2d 219 (Ind. Ct. App.), *reh’g*, 838 N.E.2d 475 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1005 (Ind. 2006).

342. 9 U.S.C. § 9 (2000).

343. *Rogers*, 835 N.E.2d at 222 (quoting *Photopaint Tech., LLC v. Smartlens Corp.*, 335 F.3d

of the FAA provides, in pertinent part:

If the parties in their agreement have agreed that a judgment of the Court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time *within one year after the award is made* any party to the arbitration *may* apply to the court so specified for an order confirming the award³⁴⁴

The court in *Rogers* rejected the argument of the party seeking belated confirmation that “the foregoing provision is not intended as a statute of limitations[,]”³⁴⁵ but rather that the use of the “permissive word ‘may’ preceding the word ‘apply[]’ . . . afford[s] a discretionary one year time period to a party wishing to confirm an award.”³⁴⁶ Relying on federal authority for the proposition that “[a] one year limitations period is instrumental in achieving [the] goal [of establishing conclusively the rights between the parties,]”³⁴⁷ the court in *Rogers* ruled that the party seeking confirmation “failed to seek confirmation of the award within the one-year statute of limitations[,] . . . [and, therefore,] the trial court properly dismissed [the] complaint for judgment upon [the] arbitral award.”³⁴⁸

M. Attorney Fees

In *Masonic Temple Ass’n v. Indiana Farmers Mutual Insurance Co.*,³⁴⁹ the court adopted the “third-party litigation exception” to the “general rule that each party to a litigation must pay his own attorney fees.”³⁵⁰ The court in *Masonic Temple* described the third-party litigation exception as follows:

When the defendant’s breach of contract caused the plaintiff to engage in litigation with a third party to protect its interests and such action would not have been necessary but for defendant’s breach, attorney fees and litigation expenses incurred in litigation with a third party may be recovered as an element of plaintiff’s damages from defendant’s breach of contract. These attorney fees and litigation expenses are foreseeable damages³⁵¹

According to the court in *Masonic Temple*, the “elements” of the third-party litigation exception are: “The plaintiff became involved in a legal dispute

152, 158 (2d Cir. 2003)). Because the dispute in *Rogers* involved a “loan contract,” the Indiana Uniform Arbitration Act, Indiana Code section 34-57-2-1, did not apply. *Id.* at 221.

344. *Id.* at 221 (emphasis added) (quoting 9 U.S.C. § 9 (2000)).

345. *Id.*

346. *Id.*

347. *Id.* at 222 (quoting *In re Consol. Rail*, 867 F. Supp. 25, 31 (D.D.C. 1994)).

348. *Id.*

349. 837 N.E.2d 1032 (Ind. Ct. App. 2005).

350. *Id.* at 1037-39.

351. *Id.* at 1039.

because of the defendant's breach of contract or other wrongful act; (2) the litigation was with a third party and not the defendant; and (3) the fees were incurred in that third-party litigation."³⁵² Finally, it is "not a requirement that the litigation with the third party caused by the defendant's wrongful act be in a separate action."³⁵³ "The test of recoverability of attorney fees is not whether they were incurred in a separate action, but whether they were incurred in an action against a third party."³⁵⁴

N. Proceedings Supplemental

In *Commercial Credit Counseling Services, Inc. v. W.W. Grainger, Inc.*,³⁵⁵ the court ruled that a party seeking to void an alleged "fraudulent transfer" to a creditor through proceedings supplemental need not plead fraud with particularity or specificity in order to properly place the creditor on notice of the claim.³⁵⁶ The court explained that "because proceedings supplemental are summary in nature, no formal pleadings are contemplated, and such specificity is not required."³⁵⁷ Specifically, the court explained the following:

"Proceedings supplemental are not an inappropriate vehicle to employ to set aside alleged fraudulent transfers" because these proceedings "originated in equity as remedies to the creditor for discovering assets, reaching equitable and other interest[s] not subject to levy and sale at law[,] and to set aside fraudulent conveyances."³⁵⁸

As such, the court concluded that the creditor's argument regarding lack of proper "notice" was "meritless," because "the trial courts' consideration of the [allegedly fraudulent] transactions was a near certainty."³⁵⁹

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE AND ADOPTION OF LOCAL RULES

A. Indiana Trial Rule Amendments

In August 2006, the Indiana Supreme Court ordered several relatively minor

352. *Id.*

353. *Id.*

354. *Id.* at 1039-40. In *Masonic Temple*, the court held that because an insurance company's breach of contract caused its insured to engage in litigation with a third party to protect its rights, "the attorney fees and litigation expenses incurred in the litigation with the third party may be recovered as an element of [the insured's] damages." *Id.* at 1040.

355. 840 N.E.2d 843 (Ind. Ct. App. 2006).

356. *Id.* at 851.

357. *Id.* (citing IND. TRIAL R. 69(E); *Coak v. Rebber*, 425 N.E.2d 197, 200 (Ind. Ct. App. 1981)).

358. *Id.* (quoting *Stuard v. Jackson & Wickliff Auctioneers, Inc.*, 670 N.E.2d 953, 955 (Ind. Ct. App. 1996)).

359. *Id.* (citing *Coak*, 425 N.E.2d at 200).

amendments to the Indiana Rules of Trial Procedure, effective January 1, 2007. Rule 12(B) was amended to provide that “[i]f a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading,” then defenses of lack of personal jurisdiction, incorrect venue, insufficiency of process, insufficiency of service of process or the same action pending in another state court of this state are “waived to the extent constitutionally permissible unless made in a motion within twenty [20] days after service of the prior pleading.”³⁶⁰

In addition, Rule 63—addressing disability and unavailability of a judge—was amended to enumerate the procedure for the appointment of a judge pro tempore.³⁶¹ Finally, Rule 81—governing the proposal and adoption of local rules—was amended to expand its application to “administrative districts,” in addition to local courts.³⁶²

B. Adoption of Local Rules

Before January 2005, Rule 81 passively provided that “[e]ach local court may from time to time make and amend rules governing its practice not inconsistent with these rules.”³⁶³ Effective January 2005, Rule 81 was amended to “strongly encourage” the courts to adopt local rules “not inconsistent with—and not duplicative of—these Rules of Trial Procedure or other Rules of the Indiana Supreme Court.”³⁶⁴ In addition, the January 2005 amendment provided that local courts will be “required” to adopt a set of local rules “for use in all courts of record in a county” after January 1, 2007—i.e., that the adoption of local rules by January 1, 2007 is *mandatory*.³⁶⁵ January 2007 arrived and the local courts complied.³⁶⁶

However, notably lacking is uniformity among the various counties. For example, counties differ with regard to the amount of time allowed to file a response in opposition to a motion, as well as other briefing requirements. In Marion County, a response to a motion is due within fifteen days of the motion’s filing.³⁶⁷ No “reply” is authorized by the Marion County Local Rule.³⁶⁸ In Porter County, the “opposing brief” is due within ten days of service of the movant’s

360. IND. TRIAL R. 12(B). The prior version of the Rule provided that “If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at trial any defense in law or fact to that claim for relief.”

361. IND. TRIAL R. 63(B).

362. IND. TRIAL R. 81.

363. *Id.* (pre-January 2005 version).

364. *Id.* (January 2005 amendment).

365. *Id.*

366. See INDIANA RULES OF COURT—LOCAL (Thomson West 2007) (compiling local rules for 19 Indiana counties). A comprehensive list of counties that have adopted local rules is available at the Indiana Courts web site, <http://www.in.gov/judiciary/rules/local/>.

367. Marion County LR49-TR5 R. 203.

368. *Id.*

brief.³⁶⁹ Any reply is due within five days thereafter.³⁷⁰ In Vigo County, a response to a motion is due within fifteen days and a reply is due within seven days thereafter.³⁷¹ Vigo County also imposes a twenty page limit on all initial or response briefs and a ten page limit on any reply brief.³⁷² In Hamilton County, any authorities relied upon in any brief or memorandum “which are not cited in the Northeastern Reporter system shall be attached to counsel’s brief.”³⁷³

Regarding written discovery, in Marion County, “[i]nterrogatories shall be limited to a total of [25] including subparts and ... shall not be used as a substitute for the taking of a deposition.”³⁷⁴ In Boone County, “[n]o party shall serve on any other party more than 30 interrogatories *or requests for admissions*”³⁷⁵ In Madison County, interrogatories are limited to a total of fifty and “shall NOT be used as a substitute for taking of a deposition.”³⁷⁶ In Vigo County, interrogatories “shall be kept to a reasonable limit and shall not require the answering party to make more than one hundred twenty-five (125) responses.”³⁷⁷

In Clark County, caption headings must be centered at the top of the filing and must use the word “Case” in presenting the “number assigned to the action”—as opposed to the word “Cause,” for example.³⁷⁸ In Lake County, the filing of a timely appearance effects an automatic thirty day enlargement of time to respond to a complaint, without the need for a further filing.³⁷⁹ In Wayne County, an initial enlargement of time to file a responsive pleading is “granted summarily”—upon the filing of a motion—“for up to forty-five (45) days.”³⁸⁰

In short, practitioners should review the local rules for each county in which a new matter is undertaken *early* to become familiar with the particular court’s guidelines, deadlines and other procedures ranging from font style and size, format of pleadings, limits on written discovery and deadlines for responding to motions.³⁸¹

369. Porter County LR64-TR05 R. 3300.

370. *Id.*

371. Vigo County LR84-TR7 R. 4.

372. Vigo County LR84-TR7 R. 4(D)(2).

373. Hamilton County LR29-TR00 R. 203.10.

374. Marion County LR49-TR33 R. 213.

375. Boone County LR06-TR26-BLR R. 6 (emphasis added).

376. Madison County LR48-TR33 R. 24 (“NOT” is capitalized in the actual text of the Rule).

377. Vigo County LR84-TR33 R. 10.

378. Clark County LR10-AR00 R. 7.

379. Lake County Local R. 7(D).

380. Wayne County Local R. 8(B).

381. See Michael W. Hoskins, *Juggling the Rules—Attorneys Fret over Differing Local Court Regulations*, IND. LAW., Mar. 21, 2007, at 1 (discussing colorful examples of new local court rules and practices).

INDIANA CONSTITUTIONAL DEVELOPMENTS: INCREMENTALISM AND SCHOOL TUITION

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Case law applying the Indiana Constitution evolved incrementally in several areas during the survey period. Even as the Indiana Supreme Court addressed a longstanding question regarding the availability of freestanding damages for state constitutional violations, it did so tentatively.¹ Indiana's appellate courts also moved incrementally in the areas of special laws, search and seizure, taxation and finance, and double jeopardy.² The courts applied the equal privileges and immunities clause only a few times, breaking no new ground.³ The Indiana Supreme Court explored new territory as to only one constitutional provision, the requirement that "tuition shall be without charge" in public schools.⁴

I. DAMAGES FOR STATE CONSTITUTIONAL VIOLATIONS

The Indiana Supreme Court addressed an issue of perennial interest—whether the Indiana Constitution creates an action for damages for its violation—in *Cantrell v. Morris*.⁵ The court addressed the issue in the context of a question certified by the United States District Court for the Northern District of Indiana, and the answer was careful, limited, and equivocal.⁶ The court previously has expressed its reticence at responding to certified questions because of their inherent nebulousness and lack of full record, and those limitations circumscribed the court's response in *Cantrell*.⁷

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1. See *infra* Part I.

2. See *infra* Parts III, IV, VI, VIII.

3. See *infra* Part V.

4. See IND. CONST. art. I, § 1; *infra* Part II.

5. 849 N.E.2d 488 (Ind. 2006).

6. The federal court certified the following question: "Does a private right of action for damages exist under Article I, Section 9 of the Indiana Constitution, and if so, what are the elements of the action the plaintiff must prove?" *Id.* at 491. The Indiana Supreme Court accepted the federal court's invitation to rephrase the question because it did "not believe the question as phrased is susceptible of a generally applicable response." It rephrased the question as follows:

Does an employee of a state or local governmental agency whose discharge is alleged to have violated rights of free speech guaranteed by Article I, Section 9 of the Indiana Constitution assert a claim for money damages against the unit of government or any individual responsible for the firing, and, if so, what is the source of that claim and what are its elements?

Id.

7. See *Citizens Nat'l Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1241-42 (Ind. 1996). Chief Justice Shepard has also written on the topic of pros and cons of certified questions regarding

Justice Boehm wrote the court's unanimous opinion in the case, which arose in the context of the firing of a public defender by a Lake County judge.⁸ The public defender, Cantrell, alleged that the termination was politically motivated and violated his rights under article I, section 9.⁹ Cantrell had worked in the previous election for the opponent of the judge who ultimately became his employer.¹⁰ In Cantrell's federal lawsuit, he sought damages for the violation of his state constitutional rights.¹¹

The court looked first at whether section 9 protects public employees from termination for political activities or speech, a question it had not previously addressed.¹² The court did not decide the question, concluding that "whether or not Article I, Section 9 of the Indiana Constitution affords any protection to public employees under some circumstances, a terminated employee has no private right of action for damages that arises under that Section."¹³ The court did, however, reject the defendant's argument (put forth by the attorney general, the defendant's counsel) that only statutes, not executive actions, could violate section 9.¹⁴ The court noted that it already had held that executive actions were governed by section 9.¹⁵

The court then reviewed existing remedies for wrongful discharge. It noted that, unlike a few other states, Indiana has enacted no statute creating a claim for damages for violation of the state constitution.¹⁶ It also noted that Indiana's statutes protect citizens' free speech rights and that a specific statute protects the free speech rights of "court employees."¹⁷ The court further stated that, in some cases, common law and statutory immunities do not apply, so that public officers can be held individually liable for their wrongful acts.¹⁸

The court next reviewed case law on wrongful discharge. While Indiana generally follows the doctrine of employment at will, that doctrine is limited.¹⁹ It is unlawful for employers to fire an employee for certain reasons, such as when the employee has exercised a lawful right (like claiming workers' compensation

state law. Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?*, 38 VAL. U. L. REV. 327 (2004).

8. *Cantrell*, 849 N.E.2d at 490.

9. *Id.*

10. *Id.*

11. *Id.* at 490-91.

12. *Id.* at 491-92.

13. *Id.* at 492.

14. *Id.* at 493.

15. *Id.* (citing *Whittington v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996); *Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993)).

16. *Id.* at 493 n.3 (citing statutes from Massachusetts, Arkansas, Maine, and California creating rights to actions for damages for state constitutional violations).

17. *Id.* at 493 (citing IND. CODE §§ 33-23-12-1 to -3 (2004)).

18. *Id.* at 493-94.

19. *Id.* at 494.

or reporting an unlawful working condition).²⁰ When an employee is fired for one of these unlawful reasons, the employee has a cause of action for damages for wrongful discharge.²¹

Without deciding the scope of section 9's protection of public employee speech, the court held that "to the extent Article I, Section 9 is relevant to any claim for discharge, the claim is simply a common law claim for wrongful discharge."²² The court stated that any such claim against a governmental entity would be governed by the Indiana Tort Claims Act.²³ The court indicated that the immunities conveyed by the Tort Claims Act would also apply to claims for wrongful discharge on the basis of section 9.²⁴

The court indicated that many claims for wrongful termination would fall within the "discretionary function" immunity in Indiana Code section 34-13-3-3(7), covering the "exercise of political power which is held accountable only to the Constitution or the political process."²⁵ But the court stated that discretionary function immunity is not limitless when it comes to politically motivated firings.²⁶ Quoting its previous opinion applying federal immunity law, the court stated that "public official may . . . be held liable if he violated constitutional or statutory rights that were clearly established at the time he acted such that a reasonably competent official should have then known the rules of law governing his conduct," unless the official shows extraordinary circumstances exempting the official from this standard.²⁷ Under this standard, the plaintiff first must show that the law was clearly established in relation to the specific facts of the plaintiff's case; then the court must "evaluate the objective reasonableness of the [public] official's conduct" to determine "whether reasonably competent officials would agree on the application of the clearly established right to a given set of facts."²⁸

The court then returned to a tort-based analysis, noting the provision of the Restatement (Second) of Torts indicates that some constitutional provisions give rise to damage remedies when courts determine that such a remedy is consistent with the framers' intent.²⁹ Also, federal law has implied a damage remedy for violations of the Fourth Amendment in the absence of a statute providing a remedy.³⁰ Indiana courts have implied remedies for statutory violations in some

20. *Id.*

21. *Id.* at 494-95.

22. *Id.* at 494.

23. *Id.*

24. *Id.* at 495.

25. *Id.* (quoting *Peavler v. Bd. of Comm'rs of Monroe County*, 528 N.E.2d 40, 45 (Ind. 1988)).

26. *Id.* at 495-96.

27. *Id.* at 496 (quoting *Kellogg v. City of Gary*, 562 N.E.2d 685, 703 (Ind. 1990)).

28. *Id.* (quoting *Earles v. Perkins*, 788 N.E.2d 1260, 1267 (Ind. Ct. App. 2003)).

29. *Id.* at 497 (citing RESTATEMENT (SECOND) OF TORTS § 874A (1979)).

30. *Id.* at 501 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

cases when, under the Restatement's approach, such remedies appeared consistent with legislative intent.³¹

But the court declined to imply a remedy for the violation of section 9 in the context of the certified question before it.³² "We think resolution of this issue in the abstract is particularly inappropriate because of the wide range of situations in which it may arise. We therefore explicitly leave open the extent to whether public employees enjoy Indiana constitutional protection against employment action."³³

The court reiterated that to the extent section 9 protects against politically motivated firing, "termination of an employee for exercise of a constitutional right is entitled to no lower status in tort law than termination for exercise of a statutory right."³⁴ The court reiterated that any such cause of action would fall under the Tort Claims Act unless and until the General Assembly provided some different remedy.³⁵

The final portion of the court's opinion addressed whether the Indiana Constitution itself created a private right of action for damages. As usual, the court placed great emphasis on the Constitution's language, noting that "no explicit language in the Indiana Constitution provid[es] any specific remedy for violations of constitutional rights."³⁶ It rejected the plaintiff's argument that the language of the due course of law clause³⁷ indicated the framers' desire to supply a damage remedy because that section also had no specific language relating to a remedy for constitutional violations.³⁸ The court stated that only the takings clause of article I, section 20 indicated any specific damages remedy for a constitutional violation. "In short, whether a civil damage remedy exists under Section 9, and if so, against whom, and for what types of violation are not resolved by the text of the Constitution or by any Indiana precedent."³⁹

The court also rejected the argument of the Indiana Civil Liberties Union, as *amicus curiae*, that some provisions of the Indiana Constitution are "self-executing," providing within themselves a sufficient rule to enforce the rights they convey and that those self-executing provisions imply a damage remedy.⁴⁰ The court stated that it would not address that argument in the context of a certified question because the "self-executing" concept injected additional

31. *Id.* at 497-98.

32. *Id.* at 498.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 499.

37. IND. CONST. art. I, § 12.

38. *Cantrell*, 849 N.E.2d at 499. Article I, section 12 states, in relevant part that "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. art. I, § 12.

39. *Cantrell*, 849 N.E.2d at 499.

40. *Id.*

uncertainty into the already uncertain circumstances of the certified question.⁴¹

The court also concluded that no previous Indiana state court had directly addressed, in a reported opinion, the availability of damages for a constitutional violation, although some federal courts in Indiana had done so.⁴² The United States District Court for the Northern District of Indiana had found that a damages remedy would be available for a claim under article I, section 23 alleging discriminatory zoning.⁴³ But several other federal district court cases in the United States District Court for the Southern District of Indiana, each involving a claim of illegal search and seizure under article I, section 11, found no damage remedy available under the Indiana Constitution.⁴⁴

The court indicated that federal courts have implied damage remedies for certain violations of the United States Constitution, but not others.⁴⁵ Reviewing cases, it concluded that “several states have found violations of various state constitutional rights to support private civil actions for damages, and a roughly equal number have rejected such an action.”⁴⁶

The court concluded, however, that whether a right of action is implied under the constitution itself or is available through some other means is not as important an issue in state court as it is in federal court.⁴⁷ “In the case of a federal ‘constitutional tort’ the question whether the Constitution itself is the source of a civil damage remedy is of paramount significance because federal court jurisdiction typically turns on whether the claim arises under federal law.”⁴⁸ State courts, in contrast, are courts of general jurisdiction so the claim may be brought in state court whether it arises under the constitution itself or under common law tort doctrine.⁴⁹

Also, the court found the constitutional tort concept is more important in federal courts because it is sometimes the only avenue available to provide protection against constitutional violations.⁵⁰ In state courts, in contrast, common law tort remedies are generally available even if, when the defendants are government actors, those remedies may be limited by statutes like the Tort

41. *Id.* at 499-500.

42. *Id.* at 500-01.

43. *See* *Discovery House, Inc. v. City of Indianapolis*, 43 F. Supp. 2d 997, 1004 (N.D. Ind. 1999).

44. *See Cantrell*, 849 N.E.2d at 501 n.18 (citing *Raines v. Chenoweth*, No. 1:03-CV-01289-JDTTAB, 2004 WL 2137634 (S.D. Ind. June 29, 2004); *Malone v. Becher*, No. NA 01-101-C H/H, 2003 WL 22080737 (S.D. Ind. Aug. 29, 2003); *Estate of O’Bryan v. Town of Sellersburg*, No. NA 02-238-CH/H, 2003 WL 21852320 (S.D. Ind. July 2, 2003)).

45. *Id.* at 501-04.

46. *Id.* at 504 (citing JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* 7-7 (3d ed. 2000)).

47. *Id.* at 505.

48. *Id.*

49. *Id.* at 506.

50. *Id.*

Claims Act.⁵¹ Thus, at least a limited remedy for constitutional violations is available in state courts, whereas in federal courts the constitutional tort is the only remedy in the absence of a statutory cause of action.⁵²

The court then examined whether the limits on claims imposed by the Tort Claims Act unconstitutionally limited the remedies for constitutional violations, holding that the limitations were valid.⁵³ The court concluded that the limitations in the Tort Claims Act, such as precluding punitive damages and immunizing behavior within the scope of employment, exist to preclude requiring the “innocent taxpayers” to pay damages.⁵⁴ The court recognized that some argue that a full damage remedy is required to vindicate constitutional rights, but concluded that the General Assembly has instead tipped the balance in favor of limits on liability for firing public employees to encourage innovation and leadership.⁵⁵ “The Constitution does not mandate any specific remedy for violations, so balancing of these competing interests is a matter well within the power of the General Assembly.”⁵⁶

The legal community has long awaited an answer to whether damage remedies are available for violations of the Indiana Constitution, but *Cantrell* is only the beginning of a response. The court’s decision to provide a circumscribed response may be well advised because the lack of a full record makes its opinion advisory; only a complete record would give the court a real context in which to apply the law.

But the court’s initial review of the question indicates that it will take a conservative approach, depending on the General Assembly to define (and perhaps even eliminate) the damage remedy, if any, available for constitutional violations. The court’s reliance on the existing tort-claim framework cedes the subject of damage remedies for constitutional violations to the legislative branch and tightly cabins what might otherwise be an incentive for more creative litigation under the Indiana Constitution.

II. PUBLIC SCHOOL “TUITION” UNDER ARTICLE VIII, SECTION 1

In *Nagy v. Evansville-Vanderburgh School Corp.*, the Indiana Supreme Court construed the language of article VIII, section 1, stating that the General Assembly is to provide a “system of Common Schools, wherein tuition shall be without charge, and equally open to all.”⁵⁷

The case arose from a dispute over the school’s \$20 per student “student services fee.”⁵⁸ The fee proceeds were deposited in the school’s general fund, where they were used to pay for “among other things, a coordinator of student

51. *Id.*

52. *Id.*

53. *Id.* at 506-07.

54. *Id.* at 507.

55. *Id.*

56. *Id.*

57. 844 N.E.2d 481, 484 (Ind. 2006) (quoting IND. CONST. art. I, § 1).

58. *Id.* at 482.

services, nurses, media specialists, alternative education, elementary school counselors, a police liaison program, and activities such as athletics, drama, and music.”⁵⁹ The fee was charged to all students, including those of low income.⁶⁰

A parent challenged the constitutionality of the fee, and the trial court granted the parent summary judgment on a federal constitutional ground.⁶¹ The Indiana Court of Appeals addressed the state constitutional claim, ruling that the fee violated article VIII, section 1.⁶² The Indiana Supreme Court also invalidated the fee under that constitutional section, but on different grounds, in a 4-1 opinion by Justice Rucker.⁶³

The court reviewed the history of article VIII, focusing on the meaning of “tuition,” which section 1 says is to be “without charge.”⁶⁴ The justices concluded that “the framers of Indiana’s constitution were careful not to provide for a free school system.”⁶⁵ Indeed, “[a] free public school system implies a level of educational subsidization that the framers at least did not endorse and at most rejected outright.”⁶⁶ In the 1840s, there was strong support for free education, and free public education was endorsed by a legislatively-called state convention in 1847.⁶⁷ A statewide referendum for free schools passed by fifty-six percent in 1849.⁶⁸

But some opposed totally free schools.⁶⁹ They argued that free public schools would decrease the value of private education.⁷⁰ They also argued that the poor should not be required to pay for the education of children of the rich.⁷¹ Still others feared that free common schools would undermine religious training, local government authority, or family liberties.⁷²

The court concluded that the language ultimately agreed upon by the framers fell short of establishing free schools.⁷³ “Rather than completely subsidizing education, which would fall within the meaning of a ‘free school’ system, the framers pursued a more modest, and perhaps less controversial, route: a uniform

59. *Id.* at 483.

60. *Id.*

61. *Id.*

62. The court of appeals ruled that “tuition” includes not only instructional and teaching services, but also “those functions and services which are by their very nature essential to teaching or ‘tuition.’” *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 808 N.E.2d 1221, 1230 (Ind. Ct. App. 2004), *vacated*, 844 N.E.2d 481 (Ind. 2006).

63. *Nagy*, 844 N.E.2d at 483.

64. *Id.* at 484-85 (quoting IND. CONST. art. VIII, § 1).

65. *Id.*

66. *Id.* at 485.

67. *Id.* at 486.

68. *Id.* at 487.

69. *Id.* at 486.

70. *Id.*

71. *Id.* at 487.

72. *Id.*

73. *Id.* at 489.

statewide system of public schools that would be supported by taxation.”⁷⁴ The court found the phrase “common schools” in section 1 to be equivalent to “public schools,” not “free schools.”⁷⁵ The court also looked to the 1854 Webster’s Dictionary definition of “tuition,” which means “instruction” or “teaching.”⁷⁶

The court then applied these definitions to Evansville’s fee. The court indicated its understanding that modern education involves many costs beyond those that could have been contemplated by the framers.⁷⁷ But that fact, the court stated, did not permit public schools to charge parents for all of the costs of their children’s educations beyond the very basics because the key result of the debate over funding in the 1840s and 1850s “was that public schools would be operated largely at public expense.”⁷⁸

The court then reached its central conclusion that “determining the components of a public education is left within the authority of the legislative branch of government.”⁷⁹ This conclusion is based on the language of article VIII, section 1, conveying to the legislature the responsibility of providing for common schools.⁸⁰ The court stated that the General Assembly has “considerable discretion in determining what will and what will not come within the meaning of a public education system.”⁸¹

The court noted that the legislature had enacted a “detailed, comprehensive” set of statutes governing public education comprising titles 20 and 21 of the Indiana Code.⁸² The court concluded that those functions and activities mandated or permitted by the legislature would have to be paid for by tax dollars—unless the legislature specified other financing.⁸³

Where the legislature—or through delegation of its authority the State Board [of Education]—has identified programs, activities, projects, services or curricula that it either mandates or permits school corporations to undertake, the legislature has made a policy decision regarding exactly what qualifies as a part of a uniform system of public education commanded by Article 8, Section 1 and thus what qualifies for funding at public expense.⁸⁴

Thus, “absent specific statutory authority, fees or charges for what are otherwise public education cost items cannot be levied directly or indirectly against

74. *Id.*

75. *Id.*

76. *Id.* at 490 (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1181 (1854)).

77. *Id.* at 491.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 492.

84. *Id.*

students or their parents.”⁸⁵ Only costs for programs and activities “outside of or expand[ed beyond] those identified by the legislature” may be subject to charges to students.⁸⁶ The court noted that the legislature or the State Board of Education had specified in some cases that school corporations could charge for certain items—specifically including the cost of textbook rental—and such legislative or administrative permissions were allowed by the Indiana Constitution.⁸⁷

As to Evansville’s fee, the court noted that “either the legislature or the State Board has already determined that all such items [covered by Evansville’s fee] are part and parcel of a public school education and by extension qualify for public funding.”⁸⁸ These include the “coordinator of student services, nurses, media specialists, alternative education, elementary school counselors, a drama program, a music program, speech and debate programs,” and a police liaison program.⁸⁹ The court concluded that Evansville’s fee, at least as it was administered, violated article VIII because it amounted to a charge for attending a public school and obtaining a public education.⁹⁰ The court also stated that Evansville could offer programs beyond those described in state law or State Board of Education rules, and it could fund those through fees charged to the students who participate.⁹¹

Justice Sullivan dissented, stating that the trial court’s findings of fact did not support the decision. The trial court specifically found that Evansville’s fee was not used to offset the cost of state mandated education, instruction, or curriculum.⁹² He concluded that the fee-supported programs were outside of or expanded upon those programs commanded by the legislature, so the fee was permissible.⁹³

Nagy begins to illuminate an area of state constitutional law not previously the subject of litigation in the modern era of state constitutional interpretation.⁹⁴ The court’s decision is consistent with past jurisprudence, in which the court was more expansive in its interpretation of the “structural” provisions of the Indiana Constitution than of the provisions explicitly protecting individual rights.⁹⁵ But

85. *Id.*

86. *Id.*

87. *Id.* at 492 n.12.

88. *Id.* at 492.

89. *Id.* at 492-93.

90. *Id.* at 493.

91. *Id.*

92. *Id.* at 493-94 (Sullivan, J., dissenting).

93. *Id.* at 494.

94. During the survey period, a group of plaintiffs filed suit to challenge Indiana’s school funding mechanism as inadequate under article VIII and other provisions of the Indiana Constitution. Class Action Complaint, *Bonner v. Daniels*, No. 49D01-0604-PL-16414 (Ind. Super. Ct., Marion County, Apr. 20, 2006).

95. See, e.g., Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts*, 36 IND. L. REV. 961, 986-89 (2003) (arguing that modern Indiana constitutional jurisprudence has seen

as to the Tuition Clause, the court has not clearly outlined the boundaries of the constitutional provision, but rather has permitted the General Assembly to set those boundaries by defining what is encompassed within public education and, therefore, what can and cannot be the subject of fees.

III. SPECIAL LAWS

In *Bonney v. Indiana Finance Authority*⁹⁶ and *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe County*,⁹⁷ the Indiana Supreme Court furthered the course struck several years earlier in article III, section 23 special legislation cases. *Bonney* also charts new ground in public debt and property tax analysis under article X, discussed in Part VI of this Article.

In *Bonney*, the Indiana Supreme Court considered constitutional challenges to House Enrolled Act 1008 ("HEA 1008"), the "Major Moves" legislation that authorized a seventy-five-year lease of the Indiana Toll Road.⁹⁸ *Bonney* reached the high court through expedited procedural circumstances under the Public Lawsuit Statute.⁹⁹ The lawsuit challenging the Toll Road lease was expedited because the high bidder had the right to decline to close on the lease if litigation over the constitutionality of the authorizing statute was pending on the closing date.¹⁰⁰ The lawsuit was filed on the same day the bid was accepted, which was only a few weeks before the closing date.¹⁰¹ In requesting certification of *Bonney* as a public lawsuit, the State cited concern that the plaintiffs' action might trigger the provision of the lease agreement allowing the lessor to back out of the deal if litigation remained pending on the closing date.¹⁰²

Indiana's Public Lawsuit Statute imposes procedural limitations on litigation that fall within its definitional ambit.¹⁰³ Relevant to this case, the statute provides that if a lawsuit constitutes a "public lawsuit" and plaintiffs cannot "establish facts that would entitle [them] to a temporary injunction," then a bond must be

greater development under structural portions of the constitution and less under those provisions expressly conveying individual rights).

96. 849 N.E.2d 473 (Ind. 2006).

97. 849 N.E.2d 1131 (Ind. 2006).

98. *Bonney*, 849 N.E.2d at 476.

99. *Id.* at 477-78.

100. *Id.* at 477.

101. *Id.*

102. *Id.*

103. The Public Lawsuit Statutes defines a "public lawsuit" as

(1) any action in which the validity, location, wisdom, feasibility, extent, or character of construction, financing, or leasing of a public improvement by a municipal corporation is questioned directly or indirectly, including but not limited to suits for declaratory judgments or injunctions to declare invalid or to enjoin the construction, financing, or leasing; and (2) any action to declare invalid or enjoin the creation, organization, or formation of any municipal corporation.

IND. CODE § 34-6-2-124(a) (2004).

posted.¹⁰⁴ After a two-day hearing in *Bonney*, the trial court certified various counts of the plaintiffs' action as a public lawsuit and directed plaintiffs to post a \$1.9 billion bond.¹⁰⁵ Plaintiffs appealed, and the Indiana Supreme Court took jurisdiction under Indiana Appellate Rule 56(A), which provides for the state supreme court to accept original appellate jurisdiction in rare cases.¹⁰⁶ The Indiana Supreme Court affirmed fifteen days later, ten days before the closing date for the lease agreement.¹⁰⁷

The defendants' request that the action be certified as a public lawsuit required the courts to consider the merits of the constitutional challenges to the statute because plaintiffs had to demonstrate the existence of a "substantial issue" to be tried to avoid the bond requirement.¹⁰⁸ In a unanimous opinion written by

104. The statute specifically provides,

At any time before the final hearing in a public lawsuit, the defendant may petition for an order of the court that the cause be dismissed unless the plaintiff posts a bond with surety to be approved by the court. The bond must be payable to the defendant for the payment of all damages and costs that may accrue by reason of the filing of the lawsuit if the defendant prevails.

IND. CODE § 34-13-5-7(a) (2004). This standard "requires the plaintiff in a public lawsuit to demonstrate that there is a 'substantial issue to be tried.'" *Bonney*, 849 N.E.2d at 481 (quoting *Marshall County Tax Awareness Comm. v. Quivey*, 780 N.E.2d 380, 382 n.4 (Ind. 2002) (citing *Hughes v. City of Gary*, 741 N.E.2d 1168, 1171 (Ind. 2001); *Johnson v. Tipton Cmty. Sch. Corp.*, 255 N.E.2d 92, 94 (Ind. 1970); *Boaz v. Bartholomew Consol. Sch. Corp.*, 654 N.E.2d 320, 322-23 (Ind. Tax Ct. 1995))).

105. *Bonney*, 849 N.E.2d at 478.

106. *Id.* Indiana Appellate Rule 56(A) provides:

In rare cases, the Supreme Court may, upon verified motion of a party, accept jurisdiction over an appeal that would otherwise be within the jurisdiction of the Court of Appeals upon a showing that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination. If the Supreme Court grants the motion, it will transfer the case to the Supreme Court, where the case shall proceed as if it had been originally filed there. If a filing fee has already been paid in the Court of Appeals, no additional filing fee is required.

IND. APP. R. 56(A). Although the bond statute provides for immediate appeal to the supreme court, IND. CODE § 34-13-5-7(d), the court has previously indicated that the appeal lies in the first instance in the jurisdiction of the court of appeals. See *Quivey*, 780 N.E.2d at 383-84 (noting that although Indiana Code section 34-13-5-7(d) (2004) provides for appeal to the supreme court, the plaintiffs properly filed their appeal with the court of appeals). Under *Sekerez v. Board of Sanitary Commissioners*, 304 N.E.2d 533, 533-34 (Ind. 1973), the court's Rules of Procedure (and not the Indiana Code) direct which cases the supreme court hears on direct appeal. In *Quivey*, however, the court also granted emergency transfer under Appellate Rule 56(A). 780 N.E.2d at 384.

107. *Bonney*, 849 N.E.2d at 473, 477.

108. *Id.* at 480-81; see *supra* note 104. The Indiana Supreme Court first considered and rejected plaintiffs' statutory arguments that the Public Lawsuit Statute did not apply because IFA was not a municipal corporation or because the statute applied only to challenges to acquisition of public improvements. *Bonney*, 849 N.E.2d at 478-80. The court held that the IFA as a "public

Justice Boehm, the court found no constitutional defect with respect to the three issues raised by the plaintiffs on appeal, including whether the legislative decision to allocate some of the funds received from the lease to the seven northern counties through which the Toll Road runs constitutes special legislation in violation of article IV, section 23.¹⁰⁹

The court held that HEA 1008 did not constitute special legislation in violation of article IV, section 23. Noting its decision three years prior in *Municipal City of South Bend v. Kimsey*,¹¹⁰ the court recited that the purpose of the section 23 prohibition “is to prevent state legislatures from granting preferences to some local units or areas within the state, and thus creating an irregular system of laws, lacking state-wide uniformity.”¹¹¹ The court then followed the framework set out in *Kimsey* and the earlier special legislation cases.¹¹² Accordingly, the court first asked the threshold question whether the law is special or general and then noted the follow-up question: if the law is special, whether a general law can be made applicable.¹¹³ The court further noted, “[a] general law cannot ‘be made applicable’ where the law’s objective is to support a given project.”¹¹⁴ The court’s analysis at this point is somewhat puzzling as the opinion declares that laws providing particularized funding, such as funding of state university construction, cannot be made general, which implies that such laws or at least portions of such laws are special.¹¹⁵ But the opinion specifically denies that such laws become special legislation merely because they support particular projects.¹¹⁶ Indeed, the opinion goes further and indicates that, to the extent the constitution constrains individual projects made part of a larger statutory regime, the single-subject requirement of article IV, section 19, and not section 23, provides the relevant limitation.¹¹⁷ Accordingly,

corporate body” and “public instrumentality” constituted a “municipal corporation” as defined in Indiana Code section 34-6-2-86(1). *Id.* at 479. The court further held that it was not necessary to resolve whether the term “leasing” in the definition of a public lawsuit was restricted to occasions in which the municipal corporation is the lessee because HEA 1008 contemplated “financing” for various “public improvements” in addition to the provisions for the lease of the Toll Road, and so the legislation met the definition of Indiana Code section 34-6-2-124(a) regardless. *Id.* at 480.

109. Justice Dickson did not participate. *Id.* at 488. See *infra* Part VI for further discussion of the other two issues in *Bonney*.

110. 781 N.E.2d 683 (Ind. 2003).

111. *Bonney*, 849 N.E.2d at 481 (quoting *Kimsey*, 781 N.E.2d at 685 (quoting OSBORNE M. REYNOLDS, LOCAL GOVERNMENT LAW 86 (1982))) (internal quotation marks omitted).

112. See *Williams v. State*, 724 N.E.2d 1070, 1085 (Ind. 2000); *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996); *Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 299-301 (Ind. 1994).

113. *Bonney*, 849 N.E.2d at 481. No claim was raised under article IV, section 22, which prohibits special laws in sixteen enumerated categories. IND. CONST. art. IV, § 22.

114. *Bonney*, 849 N.E.2d at 481.

115. *Id.*

116. *Id.*

117. *Id.* at 482. No article IV, section 19 claim was raised by the plaintiffs, which the court indicated was appropriate because “[p]rovisions for raising public funds and directing their use are

the court held that the Major Moves legislation did not violate section 23 on the ground that allocations were made to certain counties, but not others.

The court continued its analysis to explain that the appropriations at issue did not violate section 23 “for a more fundamental reason.”¹¹⁸ The constitution authorized the General Assembly to make appropriations under article X, section 3, and therefore such appropriations were distinctly legislative and “unusually unsuitable to judicial review as a matter of separation of powers.”¹¹⁹ The court went on to note, however, that appropriations have a statewide impact because they affect the public purse, and, particularly with respect to HEA 1008, the “inclusion of some local effects in a bill of general statewide significance does not render the bill a special law.”¹²⁰

In a final disposition of the plaintiffs’ arguments with respect to the appropriations, the court noted that no rational basis for the selection of the seven counties receiving the appropriations need be shown given the conclusion that the legislation was not special.¹²¹ But to the extent that plaintiffs were raising in substance an equal privileges claim, the court recognized the possibilities of increased traffic and potential financial burden on the citizens of these counties in traveling the Toll Road and suggested that at least the latter would provide a sufficient rational basis to justify special treatment.¹²² And finally, the court found no constitutional defect in the fact that the appropriations to the seven counties were subject to different spending use limitations than those imposed on other counties for roadway allocations.¹²³

The significance of the court’s analysis reaches beyond the Major Moves legislation to the more generalized question of whether particularized appropriations require special justification consistent with the section 23 “can be made applicable” analysis. The court’s emphasis that appropriations lie within the legislative function and are distinctly unsuitable for judicial review appears to practically foreclose section 23 challenges brought merely on the ground of particularized appropriations.¹²⁴

The other special legislation case decided during the survey period by the

properly contained in the same bill.” *Id.* (citing *Hoovler v. State*, 689 N.E.2d 738, 742 (Ind. Ct. App. 1997); *Bayh v. Ind. State Bldg. & Constr. Trades Council*, 674 N.E.2d 176, 179 (Ind. 1996)).

118. *Id.*

119. *Id.* In addition to Indiana law supporting this proposition, the court cited a stream of authority from other states reaching same or similar results under their respective state constitutions. *Id.* at 482-83.

120. *Id.* at 483.

121. *Id.*

122. *Id.* The trial court had relied on the burden on local traffic. *Id.*

123. *Id.* at 483-84. The Indiana Supreme Court found that the plaintiffs had raised no substantial challenge to the Toll Road lease statute and required them to post the \$1.9 billion bond to continue, which effectively ended the litigation. *See infra* Part VI.

124. *Id.* at 483. “The laws we have found to be ‘special’ operated in only one area, typically a county, and the constituents of most legislators who supported those had no interest in the passage or failure of those bills. An appropriation does not suffer from that defect” *Id.*

Indiana Supreme Court, *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe County*, concerned three Indiana University fraternities' failures to file property tax exemption applications.¹²⁵ Accordingly, the fraternities were assessed property taxes for 2000 and 2001, due and payable 2001 and 2002.¹²⁶ During the 2003 session, the General Assembly passed a statute that "retroactively provided what amounted to a filing extension that permitted the taxpayers to apply for their 2000 and 2001 property tax exemptions in 2004 and required the county auditor to grant those exemptions."¹²⁷ When one of the fraternities requested that the Monroe County Auditor provide a refund, the auditor moved for a declaratory judgment that the statute was unconstitutional as a special law.¹²⁸ The trial court agreed and found the law unconstitutional under article IV, sections 22 and 23.¹²⁹

In an opinion written by Chief Justice Shepard, the court invalidated the statute as a special law. Chief Justice Shepard began the opinion with a historical discussion of the rationale behind section 22 as illuminated by the debates of the Constitutional Convention.¹³⁰ The historical evidence suggested that the majority of Indiana legislation passed before the Constitutional Convention—from two-thirds to ninety percent—was special in nature.¹³¹ The limitation on special or local laws was thus a priority of the delegates in 1850,

125. 849 N.E.2d 1131, 1133 (Ind. 2006).

126. *Id.*

127. *Id.* at 1133. Section 44 of Public Law 256-2003 specifically provides:

(a) This SECTION applies to property that:

(1) is used for a fraternity for students attending Indiana University;

(2) is owned by a nonprofit corporation that was previously determined by the auditor of the county in which the property is located to be eligible to receive a property tax exemption . . .

(3) is not eligible for the property tax exemption . . . for property taxes due and payable in 2001 or 2002 because the nonprofit corporation failed to timely file an application

(b) . . . [T]he auditor of the county in which the property described in subsection (a) is located shall:

(1) waive noncompliance with the timely filing requirement for the exemption application in question; and

(2) grant the appropriate exemption.

(c) A property tax exemption granted under this SECTION applies to:

(1) property taxes first due and payable in 2001; and

(2) property taxes first due and payable in 2002.

2003 Ind. Legis. Serv. Pub. L. No. 256-2003, § 44 (West).

128. *Alpha Psi*, 849 N.E.2d at 1134.

129. *Id.*

130. *Id.* at 1135.

131. *Id.* (citing Frank E. Horack & Matthew E. Welsh, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109, 115 (1936); 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 2043 (1850)).

in part because of the time lawmakers devoted to consideration of local legislation as opposed to legislation of statewide importance and effect.¹³²

With this background, the court undertook to clarify its characterization in *Kimsey* that a “statute is ‘general’ if it applies ‘to all persons or places of a specified class throughout the state.’”¹³³ The court indicated that the term “class” in this analysis is not merely the group the statute identifies “but rather the broader classification to which the particular group belongs.”¹³⁴ As to the statute at issue in this case, the specified classification “includes at least all property-owning fraternities and sororities, because that is the smallest relevant class the legislature has defined by statute as eligible for a property tax exemption.”¹³⁵ If a later law “singles out a group smaller than the previously specified class to receive unique privileges, [then] the law necessarily becomes special.”¹³⁶ Because the statute targeted only Indiana University (“IU”) fraternities that missed two specific filing deadlines (but had previously been exempt), the law was special “[u]nder even the gentlest scrutiny.”¹³⁷

Having found the law special, the court went on to analyze whether “inherent characteristics” of the legislatively targeted class justified the special law.¹³⁸ The court further suggested that “[i]n our more recent cases, we have typically looked first to whether some uniqueness exists in the class specified in the special law.”¹³⁹ Citing as comparators the county-specific riverboat gambling legislation analyzed in *Indiana Gaming Commission v. Moseley*,¹⁴⁰ the Tippecanoe County-specific statute authorizing increased economic development income taxation in *State v. Hoovler*,¹⁴¹ and the Lake County special property taxation provisions considered in *State ex rel. Attorney General v. Lake Superior Court*,¹⁴² the court found missing any unique circumstances of IU fraternities that would similarly justify the retroactive tax exemption.¹⁴³ The proffered rationale by the

132. *Id.*

133. *Id.* at 1136 (quoting *South Bend v. Kimsey*, 781 N.E.2d 683, 689 (Ind. 2003) (quoting BLACK’S LAW DICTIONARY 890 (7th ed. 1999))).

134. *Id.*

135. *Id.* (citing IND. CODE §§ 6-1.1-10-16, -24 (2006)).

136. *Id.* at 1137.

137. *Id.* In a footnote, the court reflected that population categories, previously employed as a “camouflage” to make special legislation general, did not control the analysis and that the legislature would do better to “accompany special laws with ‘legislative findings as to the facts justifying the legislation’s limited territorial application.’” *Id.* at 1137 n.7 (quoting *Kimsey*, 781 N.E.2d at 691).

138. *Id.* at 1138.

139. *Id.*

140. 643 N.E.2d 296 (Ind. 1994) (finding uniqueness with respect to their suitability for riverboats based on the presence of a large body of water).

141. 688 N.E.2d 1229 (Ind. 1996) (finding uniqueness due to Superfund cleanup liability).

142. 820 N.E.2d 1240 (Ind. 2005) (finding uniqueness for historical reasons and complex characteristics of tax base).

143. *Alpha Psi*, 849 N.E.2d at 1138.

taxpayers—the financial burden of education eased by the taxes—was insufficient because that burden was not unique to the IU fraternities targeted by the legislation.¹⁴⁴ Indeed, the taxpayers' unique need for assistance—based on their own inattentiveness to a general law—doomed the statute as an invalid special law.¹⁴⁵

Consistent with his past position in special legislation cases, Justice Sullivan dissented, primarily on the rationale that the court's review usurped the legislative function.¹⁴⁶ Justice Sullivan limited his dissent to several points. First, he observed that, with the decision in *Alpha Psi*, the court had expanded the classifications subject to scrutiny beyond geographical classifications.¹⁴⁷ Second, he predicted that the court would face a challenge that a statute should be opened to entities outside the legislature's classification as opposed to being struck as constitutionally invalid.¹⁴⁸ Third, he criticized the court's search for inherent characteristics to justify a special law as contrary to the text of the constitutional test of situations "where a general law can be made applicable"¹⁴⁹ and as essentially legislative in nature.¹⁵⁰ Fourth, he observed that the legislation suffered constitutional defect only because of its reference to Indiana University and that requiring legislative findings to justify such a restriction trespasses too far into the separation of functions.¹⁵¹

The court's decision (and Justice Sullivan's dissent) seem generally consistent with the framework and rationale established several years ago in the earlier special legislation cases. It should be noted, however, that "curative" laws that address the problems of a single taxpayer, single property owner, or other individual or small group are not uncommon, and there is likely to be additional litigation in the future addressing such situations. Also, in moving beyond geographic classifications to include other types of laws as special, however, the court presents an interesting problem. Where does one draw the line at "the broader classification to which the particular group belongs"¹⁵²—the baseline for determining whether a given law is special or general? In *Alpha Psi*, the court headed off this problem by looking toward the related law's broad identification of all property-owning fraternities and sororities as eligible for the exemption, but other "classes" may not prove as susceptible to easy definition.

144. *Id.* at 1138-39.

145. *Id.* at 1139.

146. *Id.* (citing *City of South Bend v. Kimsey*, 781 N.E.2d 683, 697-700 (Ind. 2003) (Sullivan, J., dissenting); *State v. Hoovler*, 668 N.E.2d 1229, 1236 (Ind. 1996) (Sullivan, J., concurring in result)).

147. *Id.*

148. *Id.* at 1140.

149. IND. CONST. art. IV, § 23.

150. *Alpha Psi*, 849 N.E.2d at 1140.

151. *Id.* at 1140-41.

152. *Id.* at 1136.

IV. SEARCH AND SEIZURE

Article I, section 11 of the Indiana Constitution governing the right to be free against unreasonable search and seizure employs the language of the Fourth Amendment, but the Indiana Supreme Court has clarified that the analysis proceeds in a somewhat different manner under the state constitution.¹⁵³ In March 2005, the supreme court described the analysis as a three-part balancing test in the trash search case of *Litchfield v. State*.¹⁵⁴ The past year brought several opportunities for the supreme court and the court of appeals to apply that analysis.

In *Trimble v. State*, the Indiana Supreme Court unanimously upheld the search and seizure without a warrant of an emaciated and injured dog pulled from an outside doghouse, which led to several animal cruelty convictions.¹⁵⁵ In *Trimble*, an officer, following up on a credible tip that the animal was injured and in need of care, drove to the back of the house where guests typically arrive and knocked on the door but received no answer.¹⁵⁶ The officer began to return to his car, but stopped first at the doghouse, which was along the path of the driveway.¹⁵⁷ After coaxing the dog out of the doghouse and finding it to be emaciated and injured, the officer called an animal control officer who then removed the dog.¹⁵⁸ On these facts, the court found no Fourth Amendment violation but also separately addressed the three factors set out in *Litchfield*: “(1) the degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities, and (3) the extent of law enforcement needs.”¹⁵⁹

As to the first factor, the court noted that “[i]f a search is based on a concerned citizen’s report of an alleged crime, the degree of concern, suspicion, or knowledge that a violation has occurred is essentially the same as the reasonable suspicion required for an investigatory stop.”¹⁶⁰ That reasonable suspicion is itself adjudged on the totality of circumstances.¹⁶¹ Here, the abused condition of the dog was reported based on a firsthand observation, the officer investigating was able to corroborate the details reported, the reporting citizens had identified themselves to police, and there was no indication that these

153. *Trimble v. State*, 842 N.E.2d 798, 803 (Ind.), *adhered to on reh’g*, 848 N.E.2d 278 (Ind. 2006) (citing *Moran v. State*, 644 N.E.2d 536, 539 (Ind. 1994)).

154. 824 N.E.2d 356, 361 (Ind. 2005).

155. *Trimble*, 842 N.E.2d at 801, 803. Justice Rucker concurred in result only with respect to the section 11 analysis but without separate opinion. *Id.* at 804.

156. *Id.* at 801.

157. *Id.*

158. *Id.*

159. *Id.* at 803 (quoting *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)).

160. *Id.*

161. *Id.* (citing *Kellems v. State*, 842 N.E.2d 352, 356 (Ind. 2006); *Pawloski v. State*, 380 N.E.2d 1230, 1232-33 (Ind. 1978)).

individuals lacked reliability.¹⁶²

As to the second factor, the court found the degree of intrusion “minimal.”¹⁶³ Noting that the officer entered the property through generally accessible routes, the court found that the only item examined was the dog itself, which was within public view, although the dog happened to be inside of the doghouse at that particular moment.¹⁶⁴ The mere presence of police on the property “through normal means of approach to residences or other structures” was not unreasonable, contrary to the defendant’s argument.¹⁶⁵

Regarding the third factor, “concern for the health and safety of others, including animals” enhanced the severity of the law enforcement need.¹⁶⁶ In conclusion, the court clarified that the information police had would not have justified entry into the home.¹⁶⁷ But approaching the house was reasonable, and “[o]nce in the yard, the object of his search—an ambulatory animal in open space—is fair game; particularly when there are immediate health concerns regarding the dog.”¹⁶⁸

Similarly, in *Holder v. State*, the degree of concern that a violation of law had occurred and the need for law enforcement protection of the public weighed heavily in comparison to the nature and extent of an intrusion into the home of a defendant, justifying a warrantless search under section 11.¹⁶⁹ In *Holder*, police smelled a strong odor of ether in the neighborhood and ultimately detected the source of the ether as coming from inside the defendant’s home; they located the odor by sniffing a partially opened basement window at the defendant’s home.¹⁷⁰ After police knocked on a back door (following no answer from a knock at the front door), the defendant exited the home and conversed with the officers outside, but refused to consent to a search.¹⁷¹ During his conversation with the officers, the defendant indicated that his three-year-old granddaughter as well as other individuals were inside the home.¹⁷² The officers then entered the home without the warrant and discovered methamphetamine, precursors, and related paraphernalia.¹⁷³

In a unanimous opinion by Justice Dickson, the court found that three factors—the release of additional ether fumes into the air when the defendant opened the door in response to the police officer’s knock; the defendant’s admission that methamphetamine charges were pending against him in another

162. *Id.* at 804.

163. *Id.* at 803.

164. *Id.*

165. *Id.*

166. *Id.* at 804.

167. *Id.*

168. *Id.*

169. 847 N.E.2d 930, 940-41 (Ind. 2006).

170. *Id.* at 934.

171. *Id.*

172. *Id.*

173. *Id.* at 934-35.

county; and his acknowledgment that others, including a three-year-old child, were in the home—“together clearly demonstrate[d] two of the three *Litchfield* balancing factors—police concern that a violation of law has occurred, and the extent of law enforcement needs for protection of the public.”¹⁷⁴ These factors “strongly outweigh[ed]” the intrusion imposed on the defendant, including both the sniff at the window and the eventual warrantless entry of the home.¹⁷⁵ The court rejected the defendant’s argument that the knock at the back door was highly intrusive, noting that if the smell detected was natural gas, “it would clearly have been reasonable, proper, and expected for the officers to knock at the rear door of a home after the failure of their attempt to rouse occupants at the front door.”¹⁷⁶ Under *Holder*, it appears that the privacy interests of occupants of homes operating as ongoing methamphetamine laboratories will generally be outweighed by the exigency of the danger created by such laboratories when the probable cause is based on firsthand observation of current operation.¹⁷⁷

In *Hardister v. State*, the supreme court unanimously approved another warrantless entry of a home, this time under even more unusual circumstances.¹⁷⁸ Officers received an anonymous tip that individuals with guns had drugs inside the residence.¹⁷⁹ When police knocked on the door and revealed their identity, individuals inside the home fled to the back of the residence.¹⁸⁰ The police followed around the house to the rear and while doing so, noticed through a window an individual disposing of white powder down a drain.¹⁸¹ Following this observation, a general “melee” occurred with certain occupants retreating to the roof (where some were apprehended), bags with white powder being thrown on the ground from the roof, and officers ultimately entering the home through a second-story window.¹⁸² Significantly, the court found that no “search” occurred when the officers (outside the house) followed the fleeing residents (in the house) around to the back door.¹⁸³ Rather, the police reasonably pursued fleeing suspects to a backyard area that was “at most a semi-private place.”¹⁸⁴ Once the police observed the disposal of white powder during this pursuit, exigent

174. *Id.* at 941.

175. *Id.*

176. *Id.*

177. *See id.* at 939 (citing cases and noting under the Fourth Amendment analysis that “[s]everal courts have concluded that a belief that an occupied residence contains a methamphetamine laboratory, which belief is found on probable cause based largely on observation of odors emanating from the home, presents exigent circumstances permitting a warrantless search for the occupants’ safety,” and agreeing without qualification).

178. 849 N.E.2d 563, 573 (Ind. 2006).

179. *Id.* at 568.

180. *Id.*

181. *Id.*

182. *Id.* at 568-69.

183. *Id.* at 572.

184. *Id.* (“Law enforcement is not baseball and the residence of a fleeing suspect does not constitute a base that is a safe haven from being tagged out.”).

circumstances justified entry into the home.¹⁸⁵ The court approved the police action as reasonable under section 11 for the same reasons justifying that action under the Fourth Amendment.¹⁸⁶

The high court also considered the reasonableness of searches in several traffic stop cases decided during the survey period. In *State v. Quirk*, in a unanimous opinion by Justice Rucker, the court rested its decision exclusively on a section 11 violation and did not address the Fourth Amendment claim in affirming the trial court's suppression of evidence from a canine search.¹⁸⁷ In *Quirk*, a truck driver was stopped due to a non-working headlight, answered a series of questions and consented to a search of the cargo area, but did not consent to a search of the truck's cabin area.¹⁸⁸ During this time, officers had determined that the driver had used aliases in the past and apparently had a criminal history involving narcotics trafficking decades before.¹⁸⁹ The officers released the driver, but when he pulled into a rest stop shortly thereafter, they radioed for a canine unit and detained the truck.¹⁹⁰ The canine search found cocaine.¹⁹¹

The court found the officer's detention and search of the truck at the rest stop unreasonable based on the totality of circumstances.¹⁹² The court noted that "Section 11 permits an officer, during an investigatory stop, to detain a motorist briefly only as necessary to complete the officer's work related to the illegality for which the motorist was stopped," and that the traffic stop was unchallenged as an appropriate detention.¹⁹³ But the court concluded that the totality of information gained by the officers and the driver's conduct during the traffic stop did not justify the additional, separate detention and the canine search.¹⁹⁴

The court of appeals also had the opportunity to address a number of section 11 challenges to searches during the survey period. Notably, the court of appeals decided *State v. Litchfield*¹⁹⁵ following remand. In *Litchfield*, officers had searched the trash of an address that had received three shipments from an

185. *Id.* at 572-73 (citing *Brigham City v. Stuart*, 126 S. Ct. 1943, 1947 (2006); *Holder v. State*, 847 N.E.2d 930, 930 (Ind. 2006) and noting that *Holder* antedated *Brigham City* by four days).

186. *Id.*

187. 842 N.E.2d 334, 343 (Ind. 2006).

188. *Id.* at 338-39.

189. *Id.* at 338.

190. *Id.* at 339.

191. *Id.*

192. *Id.* at 343.

193. *Id.* at 340.

194. *Id.* at 341-43; *see also* *Taylor v. State*, 842 N.E.2d 327, 333-34 (Ind. 2006) (invalidating an impoundment and inventory search of a car on Fourth Amendment and section 11 grounds because the police had not shown a need to impound the car following a traffic stop in which the driver was cited for driving while suspended and was thus forbidden from further driving the vehicle; although illegally parked, the car was not shown to be creating a safety hazard).

195. 849 N.E.2d 170 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 589 (Ind. 2006).

organic garden supply store that the Drug Enforcement Agency (DEA) had identified on a target list as a garden supply store that marijuana cultivators used.¹⁹⁶ After finding evidence of marijuana refuse in the trash, police obtained a warrant, and, upon searching the home, discovered fifty-one marijuana plants on the back deck.¹⁹⁷ Following remand by the supreme court to determine whether the police had articulable individualized suspicion when the officers searched the Litchfields' trash, the trial court concluded that the police did not have the requisite level of suspicion and suppressed the evidence discovered.¹⁹⁸ The court of appeals affirmed.¹⁹⁹ Likening the DEA's list of target garden supply stores to an anonymous tip, the court found no corroboration to justify the trash search.²⁰⁰ The Litchfields' receipt of shipments from a general garden supply company did not alone create articulable individualized suspicion.²⁰¹

The court of appeals addressed several other trash search cases in addition to *Litchfield* that raised some conflict among and between the panels. In *Turner v. State*,²⁰² two members of the panel, Judges Najam and Bailey, required withdrawal of a plea agreement so that a hearing might be held on a motion to suppress evidence arising from a trash search.²⁰³ The majority noted that, on the record before the court, hearsay reports of drug-dealing activity would not provide the requisite reasonable, articulable suspicion necessary to justify the trash search that had provided evidence for a probable cause affidavit for a warrant to search the home.²⁰⁴ Judge Baker dissented on the ground that it was not necessary to allow withdrawal of the plea to prevent manifest injustice.²⁰⁵ Rather, the police acted in accord with pre-*Litchfield* law, and the defendant's decision to plead guilty was based in part on that assumption.²⁰⁶ Judge Baker opined that the supreme court's ruling in *Litchfield* should not apply retroactively to *Turner*'s circumstances.²⁰⁷

The tables turned in *Richardson v. State*,²⁰⁸ heard by the same panel that decided *Turner*. In *Richardson*, an anonymous tip that the residents were involved with the manufacture of methamphetamine lacked indicia of intimate familiarity necessary to justify the trash search (which later yielded evidence that supported a warrant for search of the residence).²⁰⁹ Nonetheless, Judge Bailey

196. *Id.* at 172.

197. *Id.*

198. *Id.* at 172-73.

199. *Id.* at 175.

200. *Id.* at 174-75.

201. *Id.* at 174.

202. 843 N.E.2d 937, 945 (Ind. Ct. App. 2006).

203. *Id.* at 939, 944-45.

204. *Id.* at 943-44.

205. *Id.* at 946.

206. *Id.*

207. *Id.*

208. 848 N.E.2d 1097 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 590 (Ind. 2006).

209. *Id.* at 1103.

joined Judge Baker's decision to decline to apply the exclusionary rule to the evidence discovered in the trash search because the officers acted in good faith following then-controlling precedent in conducting the trash search.²¹⁰ Accordingly, the good faith exception applied, and exclusion was not required.²¹¹ Judge Najam dissented on the ground that the statutory good faith exception could not defeat the retroactive constitutional rule announced by the supreme court in *Litchfield*.²¹²

However, in *Membres v. State*,²¹³ the majority, consisting of then Chief Judge Kirsch and Judge Crone, declined to apply the good faith exception to save a trash search not based on reasonable, articulable suspicion when an informant's information about a drug deal was not supported by specific indicia of reliability.²¹⁴ In this case, Judge Bailey dissented consistent with the majority opinion in *Richardson*—on grounds that the statutory good faith exception applied because the search was reasonable under prevailing law at the time.²¹⁵ The supreme court has granted transfer in *Membres*.²¹⁶ As of the time of publication, the court has not rendered its decision.

In *Richardson*, *Turner*, and *Membres*, the split among the panels concerned the remedy required, not the application of the *Litchfield* analysis to the searches at issue, as to which the judges appeared to be in general agreement. Significant to the *Richardson*, *Turner*, and *Membres* cases is the matter of timing—all concern searches that occurred before the supreme court decided *Litchfield*. Thus, the remedial questions which split the panel in these cases are limited in application to a finite number of cases.²¹⁷ The supreme court's upcoming decision in *Membres* may resolve the conflict.

The court of appeals also had occasion to apply the *Litchfield* analysis in cases outside the trash search context. In *State v. Lefevers*,²¹⁸ the court reversed a trial court's suppression of evidence because the officer's investigation and ultimate seizure of an individual arrested for driving while intoxicated met Fourth Amendment and section 11 standards.²¹⁹ In *Lefevers*, an officer received an anonymous tip of a potentially intoxicated driver.²²⁰ When a car matching the

210. *Id.* at 1103-05; *see also* *State v. Harmon*, 846 N.E.2d 1056, 1059-60 (Ind. Ct. App. 2006) (applying good faith exceptions to validate trash pull search notwithstanding a lack of reasonable, articulable suspicion for the search as required by *Litchfield*); *Edwards v. State*, 832 N.E.2d 1072, 1073, 1076 (Ind. Ct. App. 2005) (same).

211. *Richardson*, 848 N.E.2d at 1105.

212. *Id.* at 1105-07.

213. 851 N.E.2d 990 (Ind. Ct. App. 2006), *trans. granted*, 2007 Ind. LEXIS 55 (Ind. Jan. 18, 2007).

214. *Id.* at 991, 993-94.

215. *Id.* at 994-95.

216. 2007 Ind. LEXIS 55 (Ind. Jan. 18, 2007).

217. *See Membres*, 851 N.E.2d at 1107 n.18.

218. 844 N.E.2d 508 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1008 (Ind. 2006).

219. *Id.* at 516.

220. *Id.* at 511.

description of the vehicle reported pulled into a convenience store, the officer pulled into a nearby parking spot and began speaking with the driver.²²¹ Noticing signs of intoxication, the officer then requested that the driver submit to a breath test, and she agreed, ultimately testing over the legal limit.²²² Under the *Litchfield* analysis, the court found that the officer's initial conversation with Lefevers was a reasonably limited intrusion given that she had, of her own accord, parked in a public place.²²³ The officer's later observation of signs of intoxication, along with the anonymous tip, permitted further investigation, including his request that she submit to a breath test.²²⁴ The court reached a similar result in *Cannon v. State*,²²⁵ finding that an officer's approach and investigation of an erratic driver who had been directed to stop during that officer's direction of traffic was a reasonable intrusion.²²⁶ In *Frensemeier v. State*,²²⁷ an officer's reasonable suspicion that a driver was intoxicated based on personal observations and the fact that the driver had been involved in an accident justified a blood draw based on law enforcement's need to keep intoxicated drivers off the road and the criminal and civil issues raised by the traffic accident.²²⁸

In *Masterson v. State*, the court affirmed the trial court's denial of suppression of evidence obtained from a warrantless search of a vehicle.²²⁹ Officers in hot pursuit of an armed robbery suspect identified the car used in the alleged robbery.²³⁰ After discovering that the vehicle was registered to an older, handicapped man rather than the suspect, police conducted an inventory search.²³¹ That search led them to the apartment of the suspect, where the suspect and evidence of the crime were discovered.²³² Notwithstanding precedent holding a similar search unreasonable,²³³ the court found this search reasonable under the *Litchfield* analysis: the significant degree of concern that a serious crime had occurred and the need of law enforcement to pursue the armed and dangerous suspect outweighed the intrusiveness of the warrantless search, which itself was minimized by the nighttime nature of the search and the lack of

221. *Id.*

222. *Id.*

223. *Id.* at 515-16.

224. *Id.*

225. 839 N.E.2d 185, 188 (Ind. Ct. App. 2005).

226. *Id.* at 192.

227. 849 N.E.2d 157 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 598 (Ind. 2006).

228. *Id.* at 164. Judge Sullivan dissented on the ground that the totality of circumstances would not lead a reasonable person to believe that a crime had been committed and thus would have suppressed the toxicology evidence of the blood draw. *Id.* at 164-65.

229. 843 N.E.2d 1001, 1002 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1007 (Ind. 2006).

230. *Id.* at 1003.

231. *Id.*

232. *Id.* at 1003-04.

233. *Id.* at 1006-07 (citing *Brown v. State*, 653 N.E.2d 77, 82 (Ind. 1995)).

certainty as to the suspect's rightful possession of the car.²³⁴

Consistent with the supreme court's approach in *Trimble* and *Holder*, the court of appeals found no section 11 violation in *Baird v. State*, concerning officers' visits to private property following a report of an explosion on the property.²³⁵ In *Baird*, a neighbor called police to report an explosion in a rural area.²³⁶ When officers arrived at the scene, they found the driveway gated but climbed a hill on the property after observing signs of fire.²³⁷ Upon climbing the hill, officers viewed a building with the glow of fire behind it, and upon further investigation, discovered an active methamphetamine lab and two individuals at work.²³⁸ Consents to searches executed by two individuals revealed further evidence of crimes.²³⁹ The trial court denied the defendant's motion to suppress and later admitted evidence recovered in the searches at trial.²⁴⁰ The court of appeals affirmed.²⁴¹ Noting that the report was not of suspicious activity *per se*, but rather of an explosion, the court ruled that the privacy interest in the yard and hillside was minimal and the need of law enforcement to investigate the circumstances of the fire outweighed it.²⁴²

The circumstances of *State v. Atkins*,²⁴³ also involving a search on private property, contrast those in *Baird*. In *Atkins*, police received a domestic disturbance call, and an officer was dispatched to the residence.²⁴⁴ Upon encountering the defendant, who was walking on his own property but carrying a jacket that obstructed the officer's view of his hands, the officer performed a patdown search.²⁴⁵ The defendant informed the officer that he had a gun, which the officer then recovered, and the defendant was charged with unlawful possession of a firearm by a felon.²⁴⁶ The court invalidated the search based upon the Fourth Amendment of the United States Constitution and section 11 of the Indiana Constitution grounds.²⁴⁷ Under section 11, the officer had no

234. *Id.* at 1007-08.

235. 854 N.E.2d 398, 401, 405 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 597 (Ind. 2006).

236. *Id.* at 401.

237. *Id.*

238. *Id.* at 402.

239. *Id.*

240. *Id.* at 402-03.

241. *Id.* at 400.

242. *Id.* at 404-05. Similarly, the court of appeals approved the selection of a particular motel room for investigation in *Tate v. State*, 835 N.E.2d 499, 507-08 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 192 (Ind. 2005), under the *Litchfield* analysis because the police acted reasonably in conducting walk-throughs of the motel due to its propensity for crime, and police had identified the room in question based on the scent of marijuana emitting from the room's air conditioning unit. *Id.* at 507-08.

243. 834 N.E.2d 1028 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 192 (Ind. 2005).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1032-35; *see* U.S. CONST. amend. IV; IND. CONST. art. I, § 11.

reasonable grounds to suspect the plaintiff of criminal activity and no basis to initiate an investigatory stop when the defendant merely walked toward the officer on his own property and complied with his directions.²⁴⁸

The court also considered several search cases relating to the necessity of the *Pirtle* advisement that an individual in custody is entitled to consult with counsel before consenting to a general search.²⁴⁹ In *Miller v. State*,²⁵⁰ a driver and his passenger appeared to lunge forward “as if they were stuffing something under the seat” when detained in a traffic stop.²⁵¹ Upon approaching the car, the officer detected the smell of marijuana and asked the driver to step out of the vehicle.²⁵² When both the driver and the passenger exited the vehicle, the officer handcuffed them.²⁵³ After the officer observed what appeared to be pills in the ashtray, he requested consent to search the car and found marijuana.²⁵⁴ The trial court admitted the recovered evidence at trial, and the court of appeals affirmed that ruling.²⁵⁵ Miller challenged the search as invalid because no *Pirtle* advisement was given prior to requesting consent to search the vehicle.²⁵⁶ The court agreed that Miller’s consent was invalid because he was in custody (after being handcuffed), but found that probable cause based on the marijuana odor justified the warrantless search.²⁵⁷

Similarly, in *Datzek v. State*,²⁵⁸ the court held that a *Pirtle* advisement was unnecessary before administering a chemical blood test because, pursuant to Indiana Implied Consent Statute,²⁵⁹ “an officer cannot offer a chemical blood test to a suspect, and the suspect cannot consent to or refuse the test, until after the officer has probable cause to believe” that a crime has occurred.²⁶⁰ Additionally, the chemical blood test was not a general search but was limited to the search for alcohol or other drugs in the body.²⁶¹ Accordingly, the court held that “the purpose of the *Pirtle* doctrine would not be served by extending that doctrine to

248. *Atkins*, 834 N.E.2d at 1034-35.

249. *See Pirtle v. State*, 323 N.E.2d 634, 640 (Ind. 1975).

250. 846 N.E.2d 1077 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 584 (Ind. 2006).

251. *Id.* at 1079 (quoting Transcript of Record at 24, *Miller v. State*, 846 N.E.2d 1077 (Ind. Ct. App. 2006) (No. 18A02-0506-CR-501)).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 1079-80.

256. *Id.* at 1080.

257. *Id.* at 1081; *see also* *Marcum v. State*, 843 N.E.2d 546, 548 (Ind. Ct. App. 2006) (citing *State v. Hawkins*, 766 N.E.2d 749, 752 (Ind. Ct. App.), *trans. denied*, 783 N.E.2d 690 (Ind. 2002) and holding that officer’s smell of burnt marijuana provided probable cause and justified warrantless search and confirmation by a drug-sniffing canine was not required to verify the officer’s suspicion).

258. 838 N.E.2d 1149 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1006 (Ind. 2006).

259. IND. CODE § 9-30-6-2(a) (2004).

260. *Datzek*, 838 N.E.2d at 1160.

261. *Id.*

apply to chemical blood testing.”²⁶²

V. RIGHT TO PRESENT A DEFENSE

Washington v. State addressed a criminal defendant’s right under article I, section 13 of the Indiana Constitution to present a defense and found that a defendant could sometimes introduce third-party alibi evidence even if the defendant had failed to comply with statutory alibi notice requirements.²⁶³ The defendant was convicted of conspiracy, burglary, kidnapping, and auto theft.²⁶⁴ During trial, he filed a late notice of alibi defense, but the trial court disallowed third-party alibi testimony because he failed to show good cause for his late notice (he testified to his alibi).²⁶⁵

The Indiana Court of Appeals ruled that exclusion of two alibi witnesses, despite the late notice, violated the defendant’s right to present a defense under article I, section 13,²⁶⁶ as well as his Sixth Amendment right to compulsory process.²⁶⁷ The Indiana Supreme Court already had ruled that, in most circumstances, section 13 gives a defendant the right to testify about his own alibi even if he gave late notice.²⁶⁸ The court ruled that the defendant’s failure to give timely alibi notice was “at most, negligence and not done willfully or in bad faith” and that any prejudice to the State was not severe.²⁶⁹ The court said that belatedly disclosed alibi testimony should be allowed when there is no evidence of bad faith or substantial prejudice to the State.²⁷⁰ In this case, however, the court of appeals affirmed the conviction because exclusion of the alibi testimony was deemed to be harmless error.²⁷¹

VI. TAXATION AND FINANCE

In *Bonney v. Indiana Finance Authority*, addressing a challenge to the proposed lease of the Indiana Toll road, the Indiana Supreme Court discussed two issues relating to the taxation and finance provisions of article X of the

262. *Id.*; see also *Schmidt v. State*, 816 N.E.2d 925, 944 (Ind. Ct. App. 2004) (finding that no *Pirtle* advisement is required for chemical breath tests); *Ackerman v. State*, 774 N.E.2d 970, 982 (Ind. Ct. App. 2002) (finding that no *Pirtle* advisement is required for field sobriety tests).

263. 840 N.E.2d 873 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1006 (Ind. 2006).

264. *Id.* at 877-79.

265. *Id.* at 878.

266. *Id.* at 883-84.

267. *Id.* at 884-86.

268. *Campbell v. State*, 622 N.E.2d 495, 499 (Ind. 1993), *abrogated in part by Richardson v. State*, 717 N.E.2d 32 (Ind. 1998). A defendant waives his right to present this evidence, however, if the trial court finds that the defendant delayed his notice of alibi to prejudice the prosecution. *Washington*, 840 N.E.2d at 885.

269. *Washington*, 840 N.E.2d at 885.

270. *Id.*

271. *Id.*

Indiana Constitution.²⁷² The factual and procedural background of *Bonney* is discussed in Part III of this Article.²⁷³ The *Bonney* plaintiffs claimed that the statute authorizing the lease violated article X, section 2, relating to payment of “Public Debt” by not requiring proceeds from the lease to be applied to certain existing obligations.²⁷⁴ They also argued that the property tax exemption conveyed to the lessor violated article X, section 1, which limits the exemptions the legislation may provide.²⁷⁵

The plaintiffs’ challenge to the planned disposition of the lease implicated article X, section 2, which provides that “revenues derived from the sale of any of the public works belonging to the State, and from the net annual income thereof, . . . shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the Public Debt.”²⁷⁶ Plaintiffs argued that certain existing governmental obligations constituted “Public Debt” within the meaning of this provision and that House Enrolled Act 1008 (“HEA 1008”)²⁷⁷ violated this section by not requiring the lease proceeds to be applied to these debts.²⁷⁸

The court approached the argument from both historical and structural perspectives. Noting the setting of the 1850 Constitutional Convention amidst the “fallout of the financial collapse” of major public works financed with state-issued debt,²⁷⁹ the court also considered article X, section 5, which provides that “[n]o law shall authorize any debt to be contracted, on behalf of the State.”²⁸⁰ The court found two facts significant in interpreting the breadth of “Public Debt” in section 2.²⁸¹ First, only the State was prohibited from issuing new debt by virtue of section 5.²⁸² Second, during the Debates of the Constitutional Convention of 1850, the terms “public debt” and “state debt” were used interchangeably.²⁸³

272. 849 N.E.2d 473, 484-88 (Ind. 2006); IND. CONST. art. I, § 2, 5.

273. See *supra* notes 96-124 and accompanying text.

274. *Bonney*, 849 N.E.2d at 476.

275. *Id.*

276. IND. CONST. art. X, § 2.

277. H.E.A. 1008, 114th Gen. Assem., 2nd Reg. Sess. (Ind. 2006).

278. *Bonney*, 849 N.E.2d at 484.

279. Under the Mammoth Internal Improvements Act of 1836, the Indiana Board of Internal Improvements was authorized to borrow up to \$10 million for the construction of canals, roads, and railroads. See An Act to Provide for a General System of Internal Improvements, Indiana Laws, Chapter II, Indiana General Assembly, 20th session, p. 5. By 1841, the State had incurred nearly \$13 million of debt and ultimately defaulted. John Joseph Wallis, *Constitutions, Corporations and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST., 211, 217 (2005).

280. *Bonney*, 849 N.E.2d at 484 (disregarding irrelevant exceptions in article X, section 5, such as repelling invasion).

281. *Id.* at 484-85.

282. *Id.* at 484.

283. *Id.* at 485.

The defendants argued that the Public Debt referred to in section 2 was retired in 1915, and no new debt had been incurred by virtue of the prohibition in section 5,²⁸⁴ and accordingly, no Public Debt existed that required retirement per section 2.²⁸⁵ The court agreed with the defendants,²⁸⁶ but it went further to clarify that because the obligations the plaintiffs identified were obligations of local government units and debts of independent authorities and were not proscribed by section 5, it followed that those debts were not affected by the section 2 requirement.²⁸⁷ The court found particularly significant the fact that those entities could reissue debt, and so any requirement to retire debt would be without practical effect.²⁸⁸ In sum, the court's reading of article X, section 2 as applying only to state debt retired in 1915 relieves that constitutional provision of any modern consequence unless additional State debt is issued for the exceptional reasons specified in article X, section 5.

The plaintiffs' other constitutional challenge addressed whether the General Assembly had authority to exempt the Indiana Toll Road from property tax once the Toll Road was leased to a private entity.²⁸⁹ HEA 1008 provided such an exemption.²⁹⁰ Article X, section 1 permits the General Assembly to "exempt from property taxation any property in any of the following classes: (1) Property being used for municipal, educational, literary, scientific, religious or charitable purposes"²⁹¹ The plaintiffs argued that upon the lease of the Toll Road to a private party, the validity of a "municipal purpose" exemption ceased to exist.²⁹² The plaintiffs argued that prior cases upholding the constitutionality of such a tax exemption relied on the public ownership of the property.²⁹³

The court "agree[d] that public ownership is ordinarily sufficient for exemption,"²⁹⁴ but the court did "not agree that it is necessary."²⁹⁵ Municipal "use" of the property triggers the constitutional exemption, and, under the lease agreement, the Toll Road continues to exist as a public road.²⁹⁶ The court

284. *Id.* at 484.

285. *Id.*

286. *Id.*

287. *Id.* at 485-86 (citing cases creating independent authorities—called body corporate and politic—allowed to issue debt, including *Steup v. Ind. Hous. Fin. Auth.*, 402 N.E.2d 1215 (1980)).

288. *Id.* at 486 ("Lawyers and investment bankers would profit from such a rule, but it is hard to see who else would."). The court also noted the perverse incentives that might result if state proceeds were required to be applied to municipal debt under the plaintiffs' reading of section 2. *Id.* at 485.

289. *Id.*

290. *Id.* at 487 (citing HEA 1008, § 39, 114th Gen. Assem., 2nd Reg. Sess. (Ind. 2006), *codified at* IND. CODE § 8-15.5-7-1 (2004)).

291. IND. CONST. art. X, § 1.

292. *Bonney*, 849 N.E.2d at 487.

293. *Id.*

294. *Id.* at 488.

295. *Id.*

296. *Id.*

concluded by noting that, as a practical matter, requiring taxes in these circumstances would “lower the rent the lessee would be willing to pay, or to subject the State to local property taxes.”²⁹⁷ Neither result would further the purpose of increasing public revenue.²⁹⁸ However, the court did not rest its analysis on this rationale, stating that the issue raised by defendants of whether the Constitution contemplates exemption when the property is publicly owned need not be decided because the “use” of the Toll Road remained municipal.²⁹⁹ Finding no constitutional infirmity in the law, the court affirmed the trial court’s decision setting a \$1.9 billion bond to avoid the lawsuit’s dismissal.³⁰⁰

The Indiana Tax Court also analyzed constitutional provisions governing property tax exemptions in *College Corner, L.P. v. Department of Local Government Finance*.³⁰¹ The case presented the question whether a for-profit real estate developer could obtain a tax exemption for certain property under the charitable purposes statutory exemption,³⁰² which codifies the provision of article X, section 1 and “provides that ‘[a]ll or part of a building is exempt from property taxation, and used [] for educational, literary, scientific, religious, or charitable purposes.’”³⁰³ The developer was working to revitalize a particular Indianapolis neighborhood and claimed the exemption only for the period during which the properties were being rehabilitated (they were later sold at market prices).³⁰⁴

The court explained that the charitable exemption is aimed at activities that relieve human want and inure to the benefit of the general public.³⁰⁵ The developer claimed that by rebuilding the neighborhood’s infrastructure, its work preserved historic character, prevented community deterioration, reduced abandoned housing and crime, and thereby relieved a burden that would have fallen on government.³⁰⁶ The court admitted that the developer was not providing “relief of human want in the sense that it is helping the less fortunate,” but “it is clear that [the developer] provides a general benefit to the community that is charitable in nature.”³⁰⁷ As the court stated, “when a private organization takes on a task that would otherwise fall to the government, this provides a benefit to the community as a whole because it allows the government to direct its funds and attention to other community needs.”³⁰⁸ The court therefore found that the

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 470, 488.

301. 840 N.E.2d 905 (Ind. Tax Ct. 2006).

302. IND. CODE § 6-1.1-10-16(a) (2006).

303. *College Corner, L.P.*, 840 N.E.2d at 908 (citing IND. CODE § 6-1.1-10-16(a) (2006)) (alteration in original).

304. *Id.* at 907.

305. *Id.* at 908.

306. *Id.* at 909.

307. *Id.*

308. *Id.* at 910.

developer met the criteria for charitable exemption despite its for-profit nature.³⁰⁹

VII. EQUAL PRIVILEGES AND DUE COURSE OF LAW

The Indiana Supreme Court clarified recent developments involving the interaction of medical malpractice law with the due course of law clause³¹⁰ and equal privileges and immunities clause (article I, section 23) in *Booth v. Wiley*.³¹¹ In earlier cases, the court had determined that it was sometimes unconstitutional, under sections 12 and 23, to apply the medical malpractice statute of limitations to bar a claim when certain facts were present.³¹² As the court stated,

the two-year occurrence-based statute of limitations may not constitutionally be applied to preclude the filing of a claim before a plaintiff either knows of the malpractice and resulting injury or discovers facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury.³¹³

The Indiana Supreme Court appeared to use *Booth*, a 3-2 decision, to clarify more precisely the rules that apply to determine whether it is constitutional to apply the strict two-year, occurrence-based statute of limitations to medical malpractice claims. The court set for the following procedures required by the medical malpractice statute of limitations:

Initially, a court must determine the date the alleged malpractice occurred and determine the discovery date—the date when the claimant discovered the alleged malpractice and resulting injury, or possessed enough information that would have led a reasonably diligent person to make such discovery. If the discovery date is more than two years beyond the date the malpractice occurred, the claimant has two years after discovery within which to initiate a malpractice action. But if the discovery date is within two years following the occurrence of the alleged malpractice, the statutory limitation period applies and the action must be initiated before the period expires, unless it is not reasonably possible for the claimant to present the claim in the time remaining after discovery and before the end of the statutory period. In such cases where discovery occurs before the statutory deadline but there is insufficient time to file, we have not previously addressed how much time should be permitted. But because *Boggs* permits such an action to be commenced after the statutory two-year occurrence-based period when timely filing is not reasonably possible, we hold that such

309. *Id.* at 910-11.

310. IND. CONST. art. I, § 12.

311. 839 N.E.2d 1168 (Ind. 2005).

312. See *Halbe v. Weinberg*, 717 N.E.2d 876 (Ind. 1999); *Harris v. Raymond*, 715 N.E.2d 388 (Ind. 1999); *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999); *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

313. *Booth*, 839 N.E.2d at 1171.

claimants must thereafter initiate their actions within a reasonable time.³¹⁴

In *Booth*, the plaintiff had pre-existing eye problems for which he sought treatment.³¹⁵ The defendant performed surgery after which the plaintiff's eye problems worsened.³¹⁶ But (taking the facts most favorable to the plaintiff on summary judgment) subsequent physicians treating his complications never indicated during the two-year limitations period that the surgery might have caused the deterioration.³¹⁷ Only after the expiration of the two-year period did a subsequent treating physician tell the plaintiff that the surgery might have caused the problem, and the plaintiff sued within a few months of learning that information.³¹⁸

The court majority concluded that, given the allegations, there was at least a genuine issue as to whether the plaintiff acted promptly in filing his claim.³¹⁹ Because he may have discovered the facts necessary to learn of the alleged malpractice after the two-year limitations period had expired, the court permitted the suit to go forward.³²⁰ However, the majority explicitly stated that "we are not holding that an expert's advice is always required to put a patient on notice that problems may be due to malpractice. In fact, in most cases, such advice is not required."³²¹ The majority also noted that the statute of limitations could be presented again as a defense at trial.³²²

Chief Justice Shepard and Justice Sullivan each dissented and concluded that the plaintiff should have known from his deteriorating eyesight after surgery that malpractice might have occurred, triggering his responsibility to investigate.³²³ Chief Justice Shepard also stated that the majority's opinion "puts us on the path that the statute of limitation cannot run unless a medical expert informs the patient that the 'pain or debilitating symptoms,' . . . are the product of negligence by a particular actor."³²⁴

In another case involving the Equal Privileges and Immunities Clause during the survey period, *Ellenwine v. Fairley*, the Indiana Supreme Court vacated a court of appeals decision that had found a constitutional flaw in a statute of limitations.³²⁵ When the plaintiffs' child was born with brain damage, the plaintiffs did not file a malpractice lawsuit at that time because the statute

314. *Id.* at 1173.

315. *Id.*

316. *Id.*

317. *Id.* at 1173-74.

318. *Id.* at 1173.

319. *Id.* at 1175-76.

320. *Id.* at 1176.

321. *Id.*

322. *Id.* at 1177.

323. *Id.* at 1177-78 (Shepard, C.J., dissenting); *id.* at 1178-79 (Sullivan, J., dissenting).

324. *Id.* at 1178 (Shepard, C.J., dissenting) (quoting *id.* at 1172, 1175).

325. *Ellenwine v. Fairley*, 846 N.E.2d 657 (Ind. 2006) (vacating 818 N.E.2d 961 (Ind. Ct. App. 2004)).

permitted filing up until the child's eight birthday if the child remained alive.³²⁶ Ultimately, the child died at age two after the two-year occurrence based medical malpractice statute of limitations had expired.³²⁷ The plaintiffs filed their claim two years after the death of their child but four years before what would have been their son's eighth birthday.³²⁸

The Indiana Supreme Court rejected the court of appeals' constitutional analysis in favor of an interpretation using the Indiana Survival Statute.³²⁹ In an unanimous opinion by Justice Sullivan, the court concluded that the Survival Statute extinguished the medical malpractice claim at the time of the child's death.³³⁰ But the court concluded that the parents could maintain an action under the Child Wrongful Death Act³³¹ and that claim was timely because it was filed within two years of the child's death.³³²

The Indiana Supreme Court also overruled a court of appeals decision invalidating a statute on equal privileges grounds in *Ledbetter v. Hunter*, another case about the medical malpractice statute.³³³ The supreme court previously had found that the medical malpractice statute satisfied constitutional requirements,³³⁴ but it did so before promulgating the standard now used to evaluate equal privileges claims.³³⁵ The court of appeals applied the current equal privileges test to conclude that the special statute of limitations for minors' medical malpractice claims was unconstitutional.³³⁶

Applying the current test, the Indiana Supreme Court first concluded that the legislature could have found inherent differences between medical malpractice claims by minors and other tort claims by minors.³³⁷ The legislature could have concluded, the court determined, that a shorter medical malpractice statute of limitations claims could increase the availability of health care by decreasing malpractice costs.³³⁸ The court of appeals rejected this rationale based on discovery responses in the litigation, which purported to show that the different statute of limitations for minors' medical malpractice claims had an insignificant

326. *Id.* at 660; IND. CODE § 34-18-7-1(b) (2004).

327. *Ellenwine*, 846 N.E.2d at 659.

328. *Id.* at 660.

329. *Id.* at 661-63 (citing IND. CODE §§ 34-9-3-1 to -5 (2004)).

330. *Id.* at 661.

331. *Id.* at 665-67 (citing IND. CODE § 34-23-1-1 (2004)).

332. *Id.* at 666.

333. *Ledbetter v. Hunter*, 842 N.E.2d 810 (Ind. 2006) (vacating 810 N.E.2d 1095 (Ind. Ct. App. 2004)).

334. *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980).

335. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

336. *Ledbetter v. Hunter*, 810 N.E.2d 1095 (Ind. Ct. App. 2004). Under Indiana Code section 34-18-7-1, a medical malpractice claim on behalf of a minor is two years or until age eight if the child is under age six when injured. In contrast, the general statute of limitations for injury to a child is two years after the child achieves majority. IND. CODE § 34-11-6-1 (2004).

337. *Ledbetter v. Hunter*, 842 N.E.2d 810, 814 (Ind. 2006).

338. *Id.*

effect on health care costs.³³⁹ The Indiana Supreme Court rejected the notion that the defendants had to provide factual proof that the legislative rationale was valid—“[d]emonstrating a lack of substantial evidence supporting a legislative rationale does not affirmatively establish that the rationale is unreasonable.”³⁴⁰ The evidence might persuade the legislature to rethink its determination, but it does not permit the courts to overturn the legislative judgment.³⁴¹ The court therefore determined that the statute did not violate the Equal Privileges and Immunities Clause of the Indiana Constitution.³⁴²

In *Scottish Rite of Indianapolis Foundation, Inc. v. Adams*,³⁴³ the Indiana Court of Appeals rejected an equal privileges challenge to provisions of the statutes governing partition of real estate.³⁴⁴ The challenged statutes permit owners with fee interests to petition for partition, but do not permit owners of interests less than fee to do so.³⁴⁵ Adams contended that this classification violated article I, section 23, but the Indiana Court of Appeals disagreed. The court found it was “reasonable to treat life tenants differently from fee simple owners based on inherent characteristics that distinguish them.”³⁴⁶ The court ruled that if a life tenant could force partition, the life tenant would be able to convey an interest greater than the life tenant’s own interest.³⁴⁷ A fee owner’s interest in property is sufficiently greater to permit different treatment under the partition laws.³⁴⁸

In *Horseman v. Keller*, an election recount case, the unsuccessful candidate raised an equal privileges challenge to the statute providing different treatment for ballots cast in person at the polls as compared to absentee ballots.³⁴⁹ The recount commission had not counted two absentee votes because the ballots were not initialed by two members of the election board, as the statute required.³⁵⁰ It appeared that the failure to apply initials to the ballot resulted from mere clerical error.³⁵¹ The trial court invalidated the statute requiring the two-member initialing because it treated absentee ballots differently than ballots cast in person.³⁵²

The supreme court found that the different treatment of two classes of ballots

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 815.

343. 834 N.E.2d 1024 (Ind. Ct. App. 2005).

344. *Id.* at 1027 (challenging IND. CODE §§ 32-17-4-1 and 32-17-4-23 (2004)).

345. *Id.* at 1026.

346. *Id.* at 1027.

347. *Id.*

348. *Id.*

349. *Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006) (addressing IND. CODE 3-12-1-13 (2005)).

350. *Id.* at 166-67.

351. *Id.* at 167.

352. *Id.*

was justified.³⁵³ The court first found inherent differences between absentee voters and those who vote in person on election day.³⁵⁴ “The fact that absentee ballots reach the hands of election officials outside of the confines of the Election Day polling place necessitate statutory procedures for receiving, verifying, storing, transporting, and counting these ballots.”³⁵⁵ The court then found that the different statutory treatment of absentee ballots reasonably related to the differences between absentee and in-person ballots.³⁵⁶ The court found it permissible to disqualify absentee ballots for clerical errors while allowing in-person ballots to be counted even when they contained clerical errors because “Election Day polling sites operate as closed environments” while absentee balloting takes place over a long period in many locations and absentee ballots are received in a variety of ways.³⁵⁷ It is therefore permissible under article I, section 23 of the Indiana Constitution for more stringent counting rules to apply to absentee ballots.³⁵⁸

VIII. DOUBLE JEOPARDY

Indiana’s appellate courts continued to apply Indiana’s separate test for multiple-punishments double jeopardy during the survey period. This test goes beyond the federal *Blockburger* multiple-punishments test, which focuses only on whether each offense of which an individual is convicted has at least one element that no other offense has.³⁵⁹ The Indiana test, derived from *Richardson v. State*,³⁶⁰ also looks at whether at least one unique fact proves each offense of which the individual is convicted.³⁶¹ The courts also applied statutory and common law principles “often described as double jeopardy, but not governed by the constitutional test.”³⁶² It is not always easy to differentiate the situations in which the courts are applying constitutional principles from those where other principles govern.

In *Grinstead v. State*,³⁶³ the Indiana Supreme Court applied double jeopardy principles in the context of a post-conviction appeal.³⁶⁴ Grinstead was convicted of murder, theft, and related conspiracy charges, and his conviction was affirmed on appeal.³⁶⁵ On appeal from denial of post-conviction relief, Grinstead raised several issues. Double jeopardy was the only issue the supreme court found

353. *Id.* at 173.

354. *Id.* at 172.

355. *Id.*

356. *Id.* at 172-73.

357. *Id.* at 173.

358. *Id.*

359. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

360. 717 N.E.2d 32 (Ind. 1999).

361. *Id.* at 52-55.

362. *Pierce v. State*, 761 N.E.2d 826, 830 (Ind. 2002).

363. 845 N.E.2d 1027 (Ind. 2006).

364. *Id.* at 1037-38.

365. *Id.* at 1030.

availing.

The court ruled that, at the time of Grinstead's appeal (before Indiana clarified its unique double jeopardy test), it was clear that an individual could not be convicted "for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished."³⁶⁶ Grinstead was convicted of theft and conspiracy to commit theft, where the theft itself was the only overt act alleged in connection with the conspiracy.³⁶⁷ His appellate lawyer raised a federal double jeopardy claim, which was rejected on appeal, but no state double jeopardy claim.³⁶⁸ The court found counsel's failure to raise the separate state claim to be ineffective assistance of appellate counsel justifying vacating the theft conviction.³⁶⁹

Similarly, in *McCann v. State*,³⁷⁰ the Court of Appeals found on post-conviction that appellate counsel was ineffective for failing to raise a double jeopardy claim when two different convictions were enhanced for the same conduct.³⁷¹ McCann was convicted of rape and murder, and he contended on post-conviction that his rape sentence could not be enhanced based on the same offense that was the basis for another conviction (murder).³⁷² The court of appeals ruled that the law was established at the time of McCann's appeal that one conviction could not be enhanced based on the same act for which a defendant was separately convicted and punished, so his appellate counsel was ineffective for failing to raise the issue on appeal and the enhancement of his rape sentence had to be vacated.³⁷³

The Indiana Supreme Court looked at double jeopardy principles in *Mathews v. State*³⁷⁴ as well, this time in the context of an arson that resulted in multiple injuries and a death.³⁷⁵ The defendant challenged his conviction of multiple counts of arson under the *Richardson* analysis, claiming that he could be convicted only once because he committed only one act of arson.³⁷⁶ In affirming the defendant's convictions for multiple counts, the Indiana Court of Appeals expanded *Richardson* by ruling that multiple convictions for multiple victims did not violate article I, section 14 even if only one act created the multiple victims.³⁷⁷

But in a unanimous opinion by Justice Boehm, the Indiana Supreme Court

366. *Id.* at 1037 (quoting *Richardson*, 717 N.E.2d at 56-57).

367. *Id.*

368. *Id.*

369. *Id.* at 1038.

370. 854 N.E.2d 905 (Ind. Ct. App. 2006).

371. *Id.* at 914-15.

372. *Id.* at 913.

373. *Id.* at 913-16.

374. 849 N.E.2d 578 (Ind. 2006).

375. *Id.* at 580-81.

376. *Id.* at 581.

377. *Mathews v. State*, 824 N.E.2d 713 (Ind. Ct. App. 2005).

resolved the issue without reaching double jeopardy principles. The court found that some crimes are defined so that a consequence is not an element of the crime, but can enhance the penalty.³⁷⁸ If the consequence serves mainly to enhance the penalty, multiple consequences do not establish multiple crimes.³⁷⁹ As an example, the court cited operating while intoxicated, the penalty for which is enhanced if bodily injury results.³⁸⁰ But, because the consequence is only a penalty enhancement, there is still just one crime even if several people are injured by the intoxicated operator.³⁸¹

Other crimes, in contrast, contain the consequence as an element, murder being an example. If a single act results in multiple murders, there can be multiple convictions.³⁸² The court then closely analyzed the arson statute, concluding that B-felony arson is a crime for which the consequence (endangering human life) is a sentence enhancement.³⁸³ Thus, it was improper as a matter of statutory construction for the defendant to be convicted of arson six times based upon the six injured victims.³⁸⁴ Rather, the statute permitted only a single B-felony conviction, and double jeopardy principles did not come into play.³⁸⁵

The Indiana Court of Appeals' applications of double jeopardy principles often were more straightforward. Arra Ransom was convicted of confinement and battery for her part in an attack on her father's girlfriend.³⁸⁶ She claimed a double jeopardy violation, arguing that she committed only one act.³⁸⁷ The court reviewed the trial court's jury instructions, concluding that the instructions did not overlap and portrayed separate incidents of confinement and battery.³⁸⁸ But "the prosecutor's closing argument did not clearly separate the evidentiary facts that the State was alleging to constitute separate offenses."³⁸⁹ The court concluded that based on the prosecutor's closing and other factors, there was no reasonable possibility that the jury could have used separate facts to convict Ransom of the separate offenses, and it therefore vacated the lesser conviction of battery.³⁹⁰

378. *Mathews*, 849 N.E.2d at 582.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.* at 583-84.

384. *Id.* at 584.

385. *Id.* at 585-87.

386. *Ransom v. State*, 850 N.E.2d 491, 494 (Ind. Ct. App. 2006).

387. *Id.* at 500.

388. *Id.*

389. *Id.*

390. *Id.* at 501. Chief Judge Kirsch dissented on the double jeopardy issue, explaining his view that the evidence clearly showed two separate crimes. *Id.* at 501-02. Judge Sullivan separately concurred, setting forth a separate analysis also supporting a double jeopardy violation. *Id.* at 502-04.

The prosecution had more success in *Barrett v. State*,³⁹¹ where the defendant was convicted of conspiracy to commit dealing in methamphetamine and operating an illegal drug lab.³⁹² She was arrested in possession of methamphetamine and many methamphetamine precursors, and she admitted manufacturing methamphetamine with intent to sell it.³⁹³ She claimed a double jeopardy violation and argued that the overt act proving the conspiracy was the same act that constituted another crime of which she was convicted.³⁹⁴ But the court found the conspiracy charge to be supported by a shopping list for methamphetamine ingredients and the defendant's admission that she intended to manufacture methamphetamine, while the illegal drug lab conviction was supported by the precursors.³⁹⁵ Because each conviction was supported by separate evidence, there was no *Richardson* problem.³⁹⁶

The Indiana Court of Appeals raised the double jeopardy issue *sua sponte* in *Scott v. State*,³⁹⁷ involving convictions for possession of cocaine as a C felony and possession of cocaine as a B felony.³⁹⁸ The court concluded that each cocaine possession conviction was based on the same cocaine.³⁹⁹ One was elevated because it occurred within 1000 feet of a school; the other was elevated because the defendant possessed a handgun.⁴⁰⁰ The court ruled that these are not separate crimes because only one act of cocaine possession occurred and required vacation of the lesser conviction.⁴⁰¹

The court also addressed double jeopardy in the context of juvenile adjudications of rape and child molesting in *D.B. v. State*.⁴⁰² The court determined that the true findings for these two offenses were based on the same act.⁴⁰³ In the adult context, under *Richardson*, the lesser conviction would have to be vacated.⁴⁰⁴ The State argued that in the juvenile context, however, there is just a single disposition based on all true findings and therefore no "multiple punishments."⁴⁰⁵ The court of appeals still required vacation of the lesser adjudication, applying the principles of article I, section 14 of the Indiana Constitution, because a single act cannot be the basis for multiple adjudications

391. 837 N.E.2d 1022 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 995 (Ind. 2006).

392. *Id.* at 1024. Judge Mathias dissented on a separate issue. *Id.* at 1030-31.

393. *Id.* at 1025.

394. *Id.* at 1029-30.

395. *Id.* at 1030.

396. *Id.*

397. 855 N.E.2d 1068 (Ind. Ct. App. 2006).

398. *Id.* at 1069.

399. *Id.* at 1074.

400. *Id.*

401. *Id.*

402. 842 N.E.2d 399, 400 (Ind. Ct. App. 2006).

403. *Id.* at 404.

404. *Id.* at 403.

405. *Id.*

of delinquency.⁴⁰⁶

IX. FREE EXPRESSION

The language of Indiana's Free Expression Clause, article I, section 9, is more detailed and expansive than its federal counterpart, but the state clause has been the source of little litigation since the Indiana Supreme Court's seminal *Price v. State*⁴⁰⁷ in 1993. *Price*'s theoretical framework set the stage for expansion of individual rights under the Indiana Constitution. Specifically in the free expression realm, *Price* created a favored status for political speech, setting a high bar that must be met before political speech can be punished by civil or criminal means.⁴⁰⁸ *Price*'s specific holding is that an individual cannot be prosecuted for disorderly conduct for political speech unless that speech can be shown to harm an identifiable individual.⁴⁰⁹

The Indiana Court of Appeals rejected a challenge to a disorderly conduct conviction similar to the one in *Price* in *Wells v. State*,⁴¹⁰ a 2-1 decision written by Judge Barnes. The defendant was involved in local politics in Monroe County, serving as a member of the Bloomington city council.⁴¹¹ Another politically active individual called a police officer at home to report that the defendant was publicly intoxicated and urinated in public.⁴¹² The officer, who also was politically active, called the state police and asked a trooper to meet him.⁴¹³ The officer and trooper found the defendant's car illegally parked, but the defendant drove it away before it could be towed.⁴¹⁴ The trooper then followed the defendant and stopped him when he made a sharp turn.⁴¹⁵

The defendant was hostile and profane toward the officer and had difficulty finding his driver's license.⁴¹⁶ The trooper concluded that the defendant was intoxicated, and when the defendant learned that the trooper was acquainted with his political enemies, he told the trooper he had been "set up."⁴¹⁷ The defendant was belligerent, loud, and profane throughout his interaction with the trooper.⁴¹⁸ He was arrested and convicted of operating while intoxicated and disorderly conduct and was acquitted of resisting law enforcement and battery on a police

406. *Id.* at 404.

407. 622 N.E.2d 954 (Ind. 1993).

408. *Id.* at 960.

409. *Id.* at 963-64.

410. 848 N.E.2d 1133 (Ind. Ct. App. 2006).

411. *Id.* at 1138.

412. *Id.* at 1139.

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.* at 1140.

417. *Id.*

418. *Id.*

officer.⁴¹⁹

On appeal, the defendant's claims included that his conviction for disorderly conduct violated article I, section 9 because his loud comments had been political in nature.⁴²⁰ The court said that determining whether this speech was political was a "difficult question."⁴²¹ The court reviewed the applicable case law and determined that the speech was not political within the meaning of *Price*, but instead was more about the conduct of private parties and therefore not political under the rules enunciated in *Whittington v. State*.⁴²² The court emphasized that complaining about police conduct toward oneself, as opposed to police conduct toward a third party, is less likely to be classified as political speech.⁴²³ The defendant's accusations that he had been "set up" by political adversaries did not move his speech into the political category, although the court acknowledged the call to be a close one.⁴²⁴

Judge Riley dissented on the political speech issue and would have vacated the disorderly conduct conviction.⁴²⁵ She wrote that the defendant's protest against police conduct generally, although he was its immediate object, was sufficient to classify his words as political speech and thereby subject them to additional protection.⁴²⁶

Also in relation to section 9, the Indiana Court of Appeals rejected a claim of a right to possess child pornography in *Logan v. State*.⁴²⁷ The defendant was convicted of possessing child pornography, and on appeal claimed that the statute under which he was convicted, Indiana Code section 35-42-2-2, unconstitutionally infringed his right to free expression under section 9.⁴²⁸ Taking guidance from *Price*, the court stated that because the speech at issue was not political, the statute would receive rational basis review and found that "[t]he State's interest in protecting child welfare easily passes this standard."⁴²⁹

X. DEATH PENALTY

The Indiana Supreme Court rejected an application of the Cruel and Unusual Punishments Clause to a death penalty case in *Matheney v. State*.⁴³⁰ Matheney claimed that the Cruel and Unusual Punishments Clause of article I, section 16

419. *Id.*

420. *Id.* at 1147.

421. *Id.* at 1148.

422. *Id.* at 1148-49 (comparing *Price v. State*, 622 N.E.2d 954, 961 (Ind. 1993) with *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996)).

423. *Id.* at 1149 (citing *Shoultz v. State*, 735 N.E.2d 818, 827 (Ind. Ct. App. 2000)).

424. *Id.* at 1149-50.

425. *Id.* at 1150-51.

426. *Id.*

427. 836 N.E.2d 467 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 994 (Ind. 2006).

428. The court's opinion also contains an extensive review of First Amendment law relative to child pornography. *Id.* at 470-73.

429. *Id.* at 474.

430. 833 N.E.2d 454 (Ind. 2005).

precluded his execution because of his serious mental illness which, the court stated, “caused him to view life through a distorted and deluded version of reality” (on furlough from prison, he killed his wife because he fantasized that she was having an affair).⁴³¹ The court stated that the defendant’s mental illness was taken into account as a potential factor in his guilt and sentencing.⁴³² The court rejected the argument that mental illness is a per se reason not to execute someone.⁴³³

XI. SENTENCING

Indiana’s appellate courts continued during the survey period to address a large number of claims under article VII, section 4, which gives the appellate courts authority to review and revise criminal sentences. As in the past, the Indiana Supreme Court appeared more willing to provide guidance by revising sentences than the Indiana Court of Appeals, which was more deferential to trial court determinations.⁴³⁴ Because review of sentences under article VII, section 4 is related to other aspects of appellate review of sentencing, these matters are fully discussed in the portion of this Developments issue pertaining to criminal law.

431. *Id.* at 454, 457.

432. *Id.* at 457.

433. *Id.*

434. *Compare* Prickett v. State, 856 N.E.2d 1203, 1210 (Ind. 2006) (revising sentence for child molesting) and Hunter v. State, 854 N.E.2d 342, 344-45 (Ind. 2006) (revising sentence for escape), *with* McMahon v. State, 856 N.E.2d 743, 748-52 (Ind. Ct. App. 2006) (declining to revise sentence for intimidation and criminal recklessness; holding that under most recently revised sentencing statute, trial courts still must list and explain mitigators and aggravators and explain how it has evaluated and balanced them and appellate courts may review those factors and their application as well as other appropriate factors).

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

Indiana's appellate courts tackled a variety of significant issues during the survey period October 1, 2005, to September 30, 2006. As in recent years, sentencing issues dominated the dockets of both courts, although issues on topics ranging from guilty pleas, confrontation rights, ineffective assistance of counsel, and indigency also got some play.¹ This Article seeks not only to summarize the significant opinions of the past year but also to offer some perspective on their likely future impact.

I. LEGISLATIVE DEVELOPMENTS

Following a national trend, the General Assembly toughened laws against sex offenders during the 2006 short session. For example, sexually violent predators who commit offenses after June 30, 2006, must be placed on lifetime parole after being released from prison.² The parolee must wear a GPS-monitoring device during this parole.³ Other legislation now prohibits sexually violent predators from volunteering on school property, at a public park, or at a youth program center in addition to prohibiting them from residing within 1000 feet of a school, public park, youth program, or within a mile of the victim's residence.⁴

Indiana distanced itself from most of the rest of the nation, however, in the area of self-defense. Although Indiana law did not previously require residents confronted with threats of bodily harm to retreat before using a gun or other deadly weapon, the self-defense statute was amended to make it clear that there is no such duty to retreat.⁵ As the author of the bill put it, the new law eliminates "any duty to retreat that a court might decide is necessary. We're only one of three states to have put it in statute to make sure that doesn't change."⁶ Although the amendment was to the self-defense statute, the arguments surrounding the legislation were framed in no small part by interest groups on both sides of the gun-control debate. The National Rifle Association pushed what it calls "Stand Your Ground" bills like this one in several other states.⁷ The Brady Campaign

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1. The appellate courts also addressed important issues of search and seizure, many of which are summarized in the survey of Indiana constitutional law. Jon Laramore & Jane A. Dall, *Indiana Constitutional Developments: Incrementalism and School Tuition*, 40 IND. L. REV. 749, 765-74 (2007).

2. IND. CODE § 35-50-6-1(e) (Supp. 2006).

3. *Id.* § 11-13-3-4(i).

4. *Id.* § 11-13-3-4(g).

5. IND. CODE § 35-41-3-2(a) (Supp. 2006).

6. Bill Ruthhart, *Lethal Force in Self-Defense is Legal, Indiana Law Says*, INDIANAPOLIS STAR, Mar. 22, 2006, at A1.

7. *Id.*

to Prevent Gun Violence, on the other hand, called such initiatives “shoot first” bills, which could encourage people to use deadly force instead of relying on trained police officers.⁸

II. SENTENCING: WHICH PUBLIC DEFENDER MUST BRING THE CLAIM

A variety of sentencing issues were addressed during the survey period. Although the appellate courts resolved important issues regarding when a sentence must be appealed, which sentences may be appealed after a guilty plea, and many of the effects of *Blakely v. Washington* on sentences, many questions remain for the courts and legislature to address in the coming months and years. This section discusses which public defender, under Indiana’s system that allocates some responsibilities to counties (direct appeals) and others to the State Public Defender (post-conviction), must bring sentencing challenges.

In 2004, the Indiana Supreme Court made clear in *Collins v. State*,⁹ that a sentence imposed pursuant to an open plea, i.e., one that gives the trial court some discretion, can—and must—be challenged on direct appeal, if it is challenged at all.

Little more than a year later, the Indiana Supreme Court acknowledged in *Kling v. State*¹⁰ that “*Collins* ha[d] given rise to questions concerning the relative roles and responsibilities of county appellate public defenders and the State Public Defender in handling belated appeals of sentences imposed following open pleas.”¹¹ Specifically, in the wake of *Collins* the State Public Defender pursued a policy of seeking to withdraw from all “open plea” post-conviction cases in which a direct appeal of the sentence had not been pursued.¹² The State Public Defender would simultaneously request the appointment of appellate counsel at county expense to investigate and pursue a belated direct appeal of the sentence.¹³ Trial courts appear to have responded differently to these requests. Many would grant the motion,¹⁴ while at least one judge would issue an order directing post-conviction counsel to confer with county appellate counsel to determine whether it was in the defendant’s best interest to delay pursuit of the post-conviction petition to allow for a belated appeal of the sentence.¹⁵

Although the State Public Defender’s role is limited to providing representation in post-conviction relief cases,¹⁶ her argument to the supreme court went even further, asserting that she had “no role or responsibility in respect to a person sentenced under an open plea” until the possible sentencing

8. *Id.*

9. 817 N.E.2d 230 (Ind. 2004).

10. 837 N.E.2d 502 (Ind. 2005).

11. *Id.* at 503.

12. *Id.* at 504-05.

13. *Id.* at 505.

14. *Id.*

15. *Id.* (discussing an order from Judge Jane Magnus-Stinson of Marion County).

16. *Id.* at 506 (citing IND. CODE § 33-40-1-2(a) (2004)).

claim was investigated and pursued by a county appellate public defender.¹⁷ This one-size-fits-all view involved no consultation with clients regarding the best course of action.

Recognizing the ethical obligation of attorneys to provide clients with sufficient information to allow their meaningful participation in decisions affecting the objectives of representation,¹⁸ the supreme court rejected the State Public Defender's view and provided clear instructions for how to address future "open plea" post-conviction cases. Specifically, deputy state public defenders must consult with clients regarding *both* potential post-conviction issues and potential sentencing issues that could be pursued by belated appeal.¹⁹ "[T]his process should involve some assessment of the relative chances for success in each proceeding, including some consideration [of] whether the client would likely be able to meet the burden of proving [a] lack of fault and diligence under P-C.R. 2."²⁰ The court continued by making clear that the State Public Defender must represent those defendants who, after consultation, decide to pursue a P-C.R. 2 belated appeal in the filing of the petition, any hearing on the petition, and an appeal if the petition is denied.²¹ If the petition is granted at the trial or appellate level, a county public defender then assumes the responsibility to perfect the belated appeal.²²

As a final point, the supreme court addressed in some detail whether a defendant who presses forward with a P-C.R. 1 petition with potential P-C.R. 2 sentencing claims "waiting in the wings" will be able to demonstrate diligence for seeking a belated appeal after the P-C.R. 1 petition is resolved.²³

The factual determination of diligence is one for the trial court or appropriate appellate court to make in the context of a particular case when P-C.R. 2 relief is sought. However, as a general matter, electing to proceed first on a P-C.R. 1 claim does not preclude a finding of diligence in a later P-C.R. 2 claim. Nor does the time spent by the State Public Defender investigating a claim count against the defendant when courts consider the issue of diligence under P-C.R. 2. Finally, with respect to P-C.R. 2 petitions filed by persons sentenced in "open pleas," we think it appropriate for courts to keep in mind that *Collins* resolved a conflict in earlier Court of Appeals' opinions regarding whether such a defendant could include a sentencing challenge in a P-C.R. 1 petition and some delay may be attributable to the prior uncertainty in the law rather than the defendant's lack of diligence.²⁴

17. *Id.* at 507.

18. *Id.* (citing IND. PROF. CONDUCT R. 1.4 cmt. 5).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 508.

23. *Id.*

24. *Id.* (internal citation omitted).

Although the court declined to adopt any sort of bright-line rule, its explanation suggests a fairly liberal approach to allowing belated appeals.

Several recent decisions have also toiled with the propriety of allowing a defendant a belated direct appeal if the notice of appeal was not filed within thirty days of sentencing.²⁵ These cases are governed by Section 1 of P-C.R. 2, which allows a belated appeal when “(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.”²⁶

Cruite v. State,²⁷ presents the fairly typical case in which a defendant pleaded guilty, was not advised of his right to appeal his sentence, and later filed a petition for post-conviction relief, which was dismissed to allow for a direct appeal of the sentence at the request of the State Public Defender shortly after *Collins*.²⁸ Even though the defendant had waited nearly six years after his sentencing to file his petition for post-conviction relief, the court of appeals focused on the absence of advisements about the right to appeal and the period of delay *after* the petition for post-conviction relief was filed in holding that the trial court should have granted the request for a belated appeal.²⁹

In *Jackson v. State*,³⁰ the court of appeals reiterated the importance of trial courts holding hearings on motions for belated appeals. In addition to the rather broad language of P-C.R. 2, courts should consider factors such as “the defendant’s level of awareness of his procedural remedy, age, education, and familiarity with the legal system, as well as whether he was informed of his appellate rights and whether he committed an act or omission that contributed to the delay” in deciding whether a belated appeal should be permitted.³¹ Because the court could not “make the necessary factual determinations” in the absence of a hearing, the case was remanded to the trial court with instructions to hold a hearing on the petition.³² Judge Barnes dissented in *Jackson*, observing that “petitions for permission to file belated appeals must be closely scrutinized so as not to allow wholesale exceptions to the State’s interest in the finality of criminal proceedings” and noting that “Jackson did not contest the length of his sentence for a period of three years.”³³

The right to pursue a belated appeal has not been allowed in cases involving especially long periods of delay. For example, in *Beatty v. State*,³⁴ the court of appeals reversed a trial court’s authorization of a belated appeal for a 1982

25. See *infra* notes 27-49 and accompanying text.

26. IND. PROF. CONDUCT R. 2.

27. 853 N.E.2d 487 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 598 (Ind. 2006).

28. *Id.* at 489.

29. *Id.* at 490-91.

30. 853 N.E.2d 138, 140 (Ind. Ct. App. 2006).

31. *Id.*

32. *Id.* at 141.

33. *Id.* at 141-42 (Barnes, J., dissenting).

34. 854 N.E.2d 406 (Ind. Ct. App. 2006).

conviction for voluntary manslaughter.³⁵ The sentence was completed in 1986, and Beatty did not learn until 1996 that a direct appeal of that conviction had never been pursued as he had requested.³⁶ Even if the court were to excuse this decade-long delay, Beatty offered no explanation for the six-year lapse between 1996 and 2002, when he sought leave to pursue a belated appeal.³⁷ This six-year lapse led the court to conclude that Beatty had not established he was without fault or was diligent as required by P-C.R. 2.³⁸

It is not entirely clear what documents need to be included with a petition under P-C.R. 2. In *Baysinger v. State*,³⁹ the Attorney General faulted a defendant for including only “his own affidavit,” but the court of appeals noted that he had also included transcripts of his guilty plea and sentencing hearing as exhibits.⁴⁰ Reviewing the guilty plea transcript, the court of appeals observed that the trial court failed to inform Baysinger of his right to appeal his sentence but instead told him he was giving up “most” of his grounds for appeal.⁴¹ Baysinger’s affidavit further demonstrated that trial counsel had not told him of the right to appeal his sentence, which collectively led to the conclusion that the failure to file a timely notice of appeal was not due to Baysinger’s fault.⁴² Moreover, Baysinger made the requisite showing of diligence by filing his pro se petition with the trial court on March 1, 2005, after reading *Collins* just one month earlier.⁴³

Although Baysinger included several documents, it does not appear that all of these are required under P-C.R. 2. Specifically, many defendants may not have access to a transcript of their guilty plea or sentencing hearing. An affidavit that alleges the right to appeal was not explained by the trial court or trial counsel would seemingly be sufficient, absent some counter-evidence from the State to the contrary. In the alternative, defendants may feel compelled to request, wait for, and review transcripts before filing motions for belated appeals.

Finally, it is important to realize that the denial of a motion for belated appeal by the trial court or court of appeals is not necessarily the end of the matter. In *Townsend v. State*,⁴⁴ the court of appeals found that the trial court erred in granting a motion to file a belated notice of appeal.⁴⁵ Although the lapse of time was relatively brief—a pro se petition for belated appeal was filed and denied in May 2004 just five months after the December 2003 sentencing hearing and an amended petition was filed by counsel and granted in April 2005—the

35. *Id.* at 407.

36. *Id.* at 410.

37. *Id.*

38. *Id.*

39. 835 N.E.2d 223 (Ind. Ct. App. 2005), *trans. denied*, 860 N.E.2d 600 (Ind. 2006).

40. *Id.* at 225.

41. *Id.*

42. *Id.*

43. *Id.*

44. 843 N.E.2d 972 (Ind. Ct. App. 2006).

45. *Id.* at 973.

amended petition included no facts showing why Townsend was without fault or that he had been diligent in pursuing an appeal.⁴⁶ Townsend bore the burden of proving these things by a preponderance of the evidence, and the lack of any evidence demonstrated a failure to meet this burden.⁴⁷ Although the court of appeals simply dismissed the appeal,⁴⁸ the Indiana Supreme Court made clear in its order denying transfer that Townsend was not precluded “from filing another petition to file a belated notice of appeal that makes the demonstrations called for by [P-C.R. 2].”⁴⁹

III. SENTENCING: SORTING THROUGH THE *BLAKELY* AFTERMATH

Although Justice O'Connor initially referred to *Blakely v. Washington*,⁵⁰ as a No. 10 “earthquake,”⁵¹ its direct impact in Indiana has ultimately proven fairly muted. In *Smylie v. State*,⁵² the Indiana Supreme Court held that *Blakely* applies to Indiana’s sentencing scheme generally but does not impact the ability to impose consecutive sentences.⁵³ Moreover, Indiana courts have also repeatedly held that criminal history or the “fact of a prior conviction,” a common aggravating circumstance in many criminal cases, is exempted from the reach of *Blakely*.⁵⁴

The prior conviction exemption was stretched even further in *Ryle v. State*,⁵⁵ which held that juvenile adjudications fall within the exception.⁵⁶ Although the *Apprendi/Blakely* exception specifically mentions the right to a jury trial, the court noted that the underlying basis for allowing enhanced sentences is recidivism.⁵⁷ Juveniles in Indiana—and in most states—are not afforded the right to a jury trial in delinquency proceedings, but they are guaranteed several other procedural protections, including “the right to notice, the right to a speedy trial, the right to confront and cross-examine witnesses, the right to compulsory process to obtain witnesses and evidence, the right to counsel, the right against self-incrimination, and the right to require the State to prove all allegations beyond a reasonable doubt.”⁵⁸ Finally, the court found unacceptable the option of retrying juvenile cases in front of a jury or conducting jury trials “in which the jury would be asked to decide whether the earlier court found the juvenile guilty

46. *Id.* at 974-75.

47. *Id.*

48. *Id.* at 975.

49. *Townsend v. State*, 855 N.E.2d 1011 (Ind. 2006) (June 16, 2006 order denying transfer).

50. 542 U.S. 296 (2004).

51. See Lyle Denniston, *Justices Agree to Consider Sentencing*, N.Y. TIMES, Aug. 3, 2004, at A14.

52. 823 N.E.2d 679 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005).

53. *Id.* at 686.

54. See, e.g., *Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005).

55. 842 N.E.2d 320 (Ind. 2005).

56. *Id.* at 321.

57. *Id.* at 322.

58. *Id.*

or not guilty.”⁵⁹

In *Young v. State*,⁶⁰ the supreme court applied *Blakely* to a case involving several robbery convictions in which the trial court had imposed slightly enhanced sentences of twelve years, to be served consecutively as to three of the eight counts.⁶¹ The court held it was improper to aggravate the sentences based on the purported admission of the defendant that he had gone on a “crime spree,” but imposed essentially the same sentence by “altering the sentences [itself] within the bounds of *Blakely* using [its] constitutional power to review and revise sentences.”⁶² Each count was reduced to the presumptive term but an additional count was ordered served consecutively instead of concurrently.⁶³

In *Neff v. State*,⁶⁴ the court offered some additional insight into the appropriate remedy when confronted with a sentencing error under *Blakely*. The State had requested remand to the trial court with instructions to allow the State an opportunity to prove the aggravators to a jury beyond a reasonable doubt.⁶⁵ Such a remand is not always required, however.

The court acknowledged its prior opinions “obviously do not reflect an adherence to a single determinative practice in concluding whether or not to remand a case with the option to prove additional aggravators. Rather, they indicate that the decision is the result of a complex calculus that must take account of numerous considerations.”⁶⁶ Remand is appropriate when an otherwise proper aggravator was deemed improper because the trial court did not follow the *Blakely* requirement of a jury, but the remand is not appropriate to prove new aggravators that had previously not been presented to the trial court.⁶⁷ When trial courts make judicial statements about certain facts, which are not proper aggravators, appellate reweighing of aggravators and mitigators is “more efficient” and appropriate.⁶⁸ Ultimately the court affirmed the court of appeals’ revision of Neff’s maximum sentence of eight years to six years because that court “carefully and methodically examined Neff’s criminal history, and weighed that history against the mitigating circumstances found by the trial court.”⁶⁹

Finally, it is important to put these cases in the appropriate context of Indiana

59. *Id.* at 323. Juvenile adjudicatory hearings result in a “true” or “not true” finding rather than a verdict of guilty or not guilty. Moreover, this language suggests a burdensome process, although many cases tried in the wake of *Blakely* in Indiana included a relatively simple second phase of the jury trial—similar to the habitual offender phase—in which the State sought to prove aggravators to the jury beyond a reasonable doubt.

60. 834 N.E.2d 1015 (Ind. 2005).

61. *Id.* at 1016.

62. *Id.* at 1017.

63. *Id.*

64. 849 N.E.2d 556 (Ind. 2006).

65. *Id.* at 559.

66. *Id.* at 560.

67. *Id.*

68. *Id.* at 562.

69. *Id.* at 563.

Appellate Rule 7(B). The supreme court continued its trend of developing principles that can be applied to future cases to ensure consistency in sentencing.⁷⁰ In *Hunter v. State*,⁷¹ the supreme court maintained its approach of avoiding *Blakely* challenges to enhanced sentences when it was possible to resolve the claim by a reduction to the presumptive term under the court's review and revise power under article VII, section 4 of the Indiana Constitution.⁷² More importantly, the court built on its body of sentencing jurisprudence beyond the principle that the maximum permissible sentence should be reserved for the worst offenses and worst offenders.⁷³ Specifically, in reviewing the maximum sentence for escape, the court noted that the nature of the escape offense involved not a premeditated plan or endangerment of life or property, but was simply a man who "walked away when he inadvertently found himself locked out of the jail," which is "surely the least noxious of escapes."⁷⁴ Moreover, the court found the defendant's record of misdemeanors and one felony—the burglary for which he was incarcerated—was "not a particularly significant aggravating circumstance" because "a prior conviction approaches an element of the offense of escape and therefore is of minimal weight."⁷⁵ Concluding that "neither the nature of the offense nor the character of the offender supports an enhanced sentence," the court reduced the sentence to the presumptive term of four years.⁷⁶

In the wake of *Blakely*, many defendants whose appeals had been previously decided, or who had pleaded guilty and never appealed their sentence, sought application of the requirement that aggravating circumstances other than prior convictions be proved to a jury beyond a reasonable doubt under *Apprendi* and *Blakely*. Each of these cases is grounded in a legitimate concern that many defendants will pursue belated appeals "on the basis of a rule that was not the law when they were convicted [and] could not have been anticipated when they were sentenced."⁷⁷ It is more tenuous, however, to suggest that retroactivity will have a "highly detrimental effect on the administration of justice" and "wreak 'havoc' on trial courts across the country."⁷⁸ Because many—if not most—defendants have a prior criminal history, *Blakely* will simply not be available to many of them. Moreover, defendants without a criminal history may not have received a term above the presumptive, which would not implicate *Blakely*. For those without a criminal history, *Blakely* would simply require, in cases in which a sentence above the presumptive term is sought, a relatively short

70. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1003, 1024-33 (2003).

71. 854 N.E.2d 342 (Ind. 2006).

72. *Id.* at 344.

73. *Id.* (citing *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002)).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Boyle v. State*, 851 N.E.2d 996, 1006 (Ind. Ct. App. 2006).

78. *Baysinger v. State*, 854 N.E.2d 1211, 1214 (Ind. Ct. App.) (quoting *Boyle*, 851 N.E.2d at 1006), *trans. denied*, 860 N.E.2d 600 (Ind. 2006).

jury proceeding in which the State seeks to prove any aggravating circumstances beyond a reasonable doubt. Consecutive sentences are exempted from this requirement, which allows for the stacking of multiple presumptive terms.⁷⁹ Moreover, a trial court need not hold a new trial on these aggravators if the State agrees to a presumptive term.⁸⁰

It seems unlikely that the Indiana Supreme Court will affirm the court of appeals' view that "[u]nless and until the U.S. Supreme Court revises or clarifies its rules on retroactivity . . . we are bound to consider the merits of belated *Blakely* appeals where appropriate."⁸¹ In *Smylie*, the supreme court held that the *Blakely* rule would be applied "retroactively to all cases on direct review at the time *Blakely* was announced."⁸² This is quite different from applying the rule to crimes and sentencing hearings that pre-dated *Blakely* (or *Apprendi*) in which a defendant did not pursue a timely direct appeal. Indeed, some judges and at least one majority opinion of the court of appeals have concluded that *Blakely* claims cannot be raised in belated appeals in which a defendant was sentenced pre-*Blakely*.

In *Robbins v. State*,⁸³ the defendant was sentenced in 1999 and filed a belated notice of appeal in 2005. The court of appeals concluded that Robbins' "direct appeal was not pending at the time that *Blakely* was decided," as required to fall within the ambit of *Smylie*.⁸⁴ The court acknowledged that Robbins had "the option of pursuing a belated appeal at the time that the *Blakely* rule was announced" but that his case had become final for purposes of retroactivity when he failed to pursue a timely direct appeal.⁸⁵

Similarly, Judge Vaidik recently explained in a separate concurring opinion in *Baysinger* that her colleagues' approach of allowing defendants the benefit of *Blakely* as part of a belated appeal would transform the guarantee that new rules for the conduct of criminal prosecutions be available to cases "pending on direct review or not yet final"⁸⁶ from *Smylie* and *Griffith v. Kentucky*⁸⁷ into a guarantee "that leaves any case that was never timely subjected to direct review perpetually 'unfinal' for the purposes of retroactivity until such time as the defendant seeks a belated appeal."⁸⁸ The issue is squarely presented in *Gutermuth v. State*,⁸⁹ which should be decided by the Indiana Supreme Court in the coming months.

79. See, e.g., *Young v. State*, 834 N.E.2d 1015 (Ind. 2005).

80. *Smylie v. State*, 823 N.E.2d 679, 687 (Ind.), cert. denied, 126 S. Ct. 545 (2005).

81. *Boyle*, 851 N.E.2d at 1006.

82. *Smylie*, 823 N.E.2d at 690-91.

83. 839 N.E.2d 1196 (Ind. Ct. App. 2005).

84. *Id.* at 1199.

85. *Id.*; see also *Boyle*, 851 N.E.2d at 1008 (Friedlander, J., dissenting).

86. *Baysinger v. State*, 854 N.E.2d 1211, 1218 (Ind. Ct. App.) (Vaidik, J., concurring in result), trans. denied, 860 N.E.2d 600 (Ind. 2006).

87. 479 U.S. 314 (1987).

88. *Baysinger*, 854 N.E.2d at 1218 (Vaidik, J., concurring in result).

89. 848 N.E.2d 716 (Ind. Ct. App.), vacated on transfer, 860 N.E.2d 588 (Ind. 2006).

IV. CHALLENGING A SENTENCE AFTER A GUILTY PLEA

It is axiomatic that plea agreements are essential to the functioning of the criminal justice system, resolving the majority of cases in far less time and expense than a trial. The Indiana Supreme Court's opinion in *Childress v. State*⁹⁰ resolved some significant confusion regarding the ability of defendants to challenge a sentence imposed after they enter into a guilty plea.

There are many types of plea agreements but little confusion about the effects of those at the polar extremes. A plea agreement that calls for a "specific term of years" affords no discretion to the trial court, and the sentence imposed has always been unassailable on appeal.⁹¹ At the other extreme, an open plea to all charges—with or without a plea agreement—gives unlimited discretion to the trial court, and the resulting sentence has been appropriately challenged on appeal pursuant to the 1970 constitutional amendment that granted Indiana's appellate courts the power to review and revise sentences.⁹² In the vast middle, however, are plea agreements that set a cap on the sentence that may be imposed or establish a sentencing range. The trial court retains some discretion, albeit limited, in imposing sentence.

In a series of opinions beginning with *Gist v. State*,⁹³ the court of appeals took a restrictive view of a defendant's ability to challenge a sentence imposed pursuant to a plea agreement providing for a sentencing cap or sentencing range.⁹⁴ *Gist* held, under a plea to a ten-year cap, the defendant "necessarily agreed that a ten-year sentence was appropriate" and therefore unassailable under Appellate Rule 7(B).⁹⁵ Several similar decisions followed.⁹⁶

In *Childress*, the Indiana Supreme Court disapproved all of these opinions. The court largely adhered to its decision in *Tumulty v. State*,⁹⁷ which held that "a defendant is entitled to contest the merits of a trial court's sentencing discretion where the court has exercised sentencing discretion, as it did here."⁹⁸ Rejecting the line of court of appeals' opinions holding otherwise in the context of plea agreement providing for a sentencing cap or sentencing range, the *Childress* court concluded that "to say that a defendant has acquiesced in his or her sentence or has implicitly agreed that the sentence is appropriate undermines in our view the scope of authority set forth in Article VII, Section 4 of the Indiana Constitution."⁹⁹ Such sentences may therefore be appealed, just as any sentence imposed after a trial or open plea. In a concurring opinion, however, Justice

90. 848 N.E.2d 1073 (Ind. 2006).

91. *Id.* at 1079 n.4.

92. *Id.* at 1079 (citing IND. CONST. art. VII, § 4).

93. 804 N.E.2d 1204 (Ind. Ct. App. 2004).

94. *Id.* at 1206.

95. *Id.*

96. See *Childress*, 848 N.E.2d at 1077 n.2 (collecting cases).

97. 666 N.E.2d 394 (Ind. 1996).

98. *Id.* at 396.

99. *Childress*, 848 N.E.2d at 1080.

Dickson expressed the view that such plea agreements “should usually be understood as strong and persuasive evidence of sentence reasonableness and appropriateness,” and appellate revision will occur “only in the most rare, exceptional cases.”¹⁰⁰

In some respects, the Indiana Supreme Court’s opinion in *Childress* is unremarkable. The court did little more than adhere to *Tumulty* in holding that defendants who plead guilty may appeal the trial court’s exercise of discretion at sentencing. Disapproving nine recent cases from the court of appeals, which had held defendants may not challenge the appropriateness of such sentences, however, is quite remarkable.

Although the supreme court’s opinion in *Childress* did little more than apply longstanding precedent, it has been greeted with something short of enthusiastic support by some players in the criminal justice system, especially trial judges.¹⁰¹ One judge is quoted as calling the decision “offensive” because defendants “essentially know what they’re going to get.”¹⁰² Another judge wondered why there were “plea bargains” if cases are not truly resolved by the agreement but instead continue with a sentencing appeal.¹⁰³

It is too early to know what effect *Childress* may have on Indiana trial and appellate courts as well as the broader criminal justice system. Many trial judges were appointing appellate counsel when requested in cases with a range or capped plea agreement—even in the face of the court of appeals’ decisions that suggested such appeals were not proper or severely restricted to review only for an abuse of discretion in the finding of the aggravators and mitigators.¹⁰⁴ It is not clear, however, whether defendants were always being properly advised of their right to appeal by trial courts or defense counsel in all (or even most) of the hundreds of criminal cases resolved each week around the State. If there were no such advisements, the clarification brought by *Childress* could lead to a significant increase in the number of sentencing appeals brought to the court of appeals each year.

By bringing clarity to this issue, *Childress* could instead have the effect of reducing the number of sentencing appeals—IF (yes, this is a big if) prosecutors and defendants begin to enter into more set plea agreements, i.e., a plea that affords the trial court no discretion at sentencing. This is easier said than done, as a prosecutor’s view of the appropriate sentence (often influenced by consultation with the victim(s)) does not always match with the defense view. Rather than compromising and negotiating, plea agreements with caps, ranges, or open terms allow the parties to pass the buck on to the trial court. After *Childress*, however, it is now clear that the trial court does not necessarily have

100. *Id.* at 1081 (Dickson, J., concurring).

101. Dionne Waugh, *Court Decisions Ignite Plea Appeals*, FORT WAYNE JOURNAL GAZETTE, Nov. 19, 2006, at 1C.

102. *Id.* (quoting Allen County Judge John F. Surbeck).

103. *Id.*

104. See, e.g., *Reyes v. State*, 828 N.E.2d 420, 426 (Ind. Ct. App. 2005), *aff’d in part, vacated in part*, 848 N.E.2d 1081 (Ind. 2006).

the last word.

Although not addressed in *Childress*, the parties would seemingly be free to negotiate a plea agreement that includes an express term that the sentence imposed by the trial court is the appropriate one and cannot be appealed. Indeed, some prosecutors have already responded to *Childress* by including a provision in plea agreements stating that defendants are forfeiting their right to appeal the sentence.¹⁰⁵ Although defendants have a constitutional right to appeal their sentence, this right—like almost all others in the criminal realm—could seemingly be waived if the waiver is knowing, intelligent, and voluntary.¹⁰⁶ An express plea term, coupled with a short colloquy as part of the acceptance of the guilty plea, would accomplish this. Forfeiting the right to appeal a sentence, however, is unlikely to come without a cost to prosecutors. If a plea agreement is truly a “bargain,” defendants may well agree to such terms. Alternatively, if prosecutors require a plea to the lead or only charge, some defendants may decide not to sign the agreement and instead plead guilty without an agreement or go to trial. In either case, the right to appeal will be preserved. Therefore, an already overburdened trial court system could face even more docket pressure. Ideally, one can hope that *Childress* leads to more discussion between parties, more negotiation, and more set pleas, which bring the sort of predictability most likely to satisfy all concerned.

Whether *Childress* motivates prosecutors and defense lawyers to resolve more cases with set pleas will determine the impact on the caseload of the Indiana Court of Appeals.¹⁰⁷ Every sentence imposed after a guilty plea that affords the trial court any discretion may be appealed, and indigent defendants, especially those sentenced to prison, have little incentive not to pursue an appeal that costs them nothing and seemingly presents no risk.¹⁰⁸ Indeed, as *Childress* and its companion case highlight, defendants who receive any sentence above the minimum under the plea agreement sometimes choose to appeal.

An increase in appeals, however, need not crush the docket of the court of appeals. Sentencing appeals, when the trial court offers a thoughtful sentencing statement that carefully articulates and balances the relevant sentencing factors, are often resolved in relatively few pages by the court of appeals, which gives considerable deference to the thoughtful judgment of trial judges at sentencing. Nevertheless, allowing such appeals whenever discretion is exercised provides an important check on this discretion and is essential to furthering the important goals of consistency and fairness in sentencing.

Two recent cases highlight just how extensive appellate sentence review in Indiana has become. In *Hole v. State*,¹⁰⁹ the Indiana Supreme Court rejected a defendant’s challenge to his ten-year sentence for B felony battery that was

105. Waugh, *supra* note 101.

106. See, e.g., Leone v. State, 797 N.E.2d 743, 750 n.5 (Ind. 2003).

107. See generally Michael W. Hoskins, *Court of Appeals Eyes Expansion; New Staff, Judges Needed to Keep up With Caseload*, IND. LAW., Dec. 27, 2006, at 17.

108. The State may not appeal a sentence. IND. R. APP. P. 7(A).

109. 851 N.E.2d 302 (Ind. 2006).

imposed pursuant to a plea agreement for a “ten (10) year sentence. [P]lacement open to the court.”¹¹⁰ Because Hole received “the precise sentence for which he bargained,” his sentence could not be challenged under Appellate Rule 7(B).¹¹¹ The court noted that Hole did not challenge “the location of his sentence” (a community corrections program or the Department of Correction), but that “this discretionary placement”¹¹² would be subject to 7(B) review had it been raised.¹¹³

In *Davis v. State*,¹¹⁴ the court of appeals addressed a challenge to a six-year sentence (four years at the Department of Correction and two years at Community Corrections) for a defendant who had seriously injured two people while driving drunk. The court emphasized the significant efforts by Davis to “improve herself,” including her regular attendance at Alcoholics Anonymous meetings, working to provide for her children, her desire to pay restitution, and her acceptance of responsibility by pleading guilty and apologizing to the victims.¹¹⁵ Based on these weighty mitigating facts and only one valid aggravator to offset it, the court reduced the sentence to “four years with the time remaining on her sentence to be served through Community Corrections so that she may continue to work to provide for her children and to pay restitution to the victims.”¹¹⁶

Although cost is often difficult to measure in the criminal justice system—and arguably should not matter when fundamental rights are at stake—some of the criticism of *Childress* has focused on the apparent opening of the floodgates of appeals and the attendant costs. The transcripts are much shorter (and cheaper), and attorneys’ costs are lower in appeals of a sentence only.¹¹⁷ If one takes a broad view of cost, an appellate reduction of a sentence by even a few years in just ten percent of appealed cases would save the State hundreds of thousands of dollars as it costs more than \$21,500 annually to incarcerate a defendant in the Department of Correction.¹¹⁸ Assuming many of these defendants get jobs and pay taxes (as opposed to committing more crimes and ending up back in prison), the savings are even greater.

V. SENTENCING: SORTING THROUGH THE 2005 STATUTORY AMENDMENTS

As summarized in last year’s survey, in response to *Blakely* and *Smylie*, the General Assembly amended Indiana’s sentencing statutes to replace the

110. *Id.* at 303.

111. *Id.* at 304.

112. *Id.*

113. *Id.* at 304 n.4.

114. 851 N.E.2d 1264 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

115. *Id.* at 1268.

116. *Id.* at 1269.

117. Waugh, *supra* note 101 (citing a cost of approximately \$125 for a guilty plea transcript compared to \$1,000 for a day-long jury trial).

118. Indiana Department of Correction, Frequently Asked Questions, <http://www.in.gov/indcorrection/facts.htm> (last visited Feb. 12, 2007).

“presumptive” sentence with a range and “advisory” term.¹¹⁹ The legislation also added language that has since created considerable confusion: “A court may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.”¹²⁰ Another unchanged and longstanding provision requires the court to make a statement of its “reasons for selecting the sentence that it imposes if the court finds aggravating circumstances or mitigating circumstances.”¹²¹ Finally, the 2005 amendments included a significant revision of the list of aggravating circumstances.¹²²

*Anglemyer v. State*¹²³ was the first decision to wrestle with this seemingly contradictory language. It held that trial courts are “no longer required to justify any deviation from the presumptive sentence” and that any “error in the trial court’s identification or weighing of [aggravating or mitigating circumstances] is not an issue that now can be raised on appeal.”¹²⁴ Transfer was granted in June 2006, oral argument was held in September, and a decision is pending from the Indiana Supreme Court. While waiting for that decision, the court of appeals continued to address the effect of the 2005 amendments in a number of cases. One panel recently framed the issues posed as a

new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, and appellate review of a trial court’s finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continuing validity or relevance of well-established case law developed under the old “presumptive” sentencing scheme is unclear.¹²⁵

As highlighted by two August opinions, disagreement has resulted and is likely to continue until these issues are resolved by the supreme court.

In *Fuller v. State*,¹²⁶ the court gave a literal reading to the final clause in section 7.1(d).

Accordingly, a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances. Rather, the

119. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 39 IND. L. REV. 893, 906 (2006). Also, for a detailed and thoughtful summary of the legislation, see Michael R. Limrick, *Senate Bill 96: How General Assembly Returned Problem of Uniform Sentencing to Indiana’s Appellate Courts*, RES GESTAE, Jan./Feb. 2006, at 18.

120. IND. CODE § 35-38-1-7.1(d) (Supp. 2005).

121. *Id.* § 35-38-1-3(3) (2004).

122. *Id.* § 35-38-1-7.1(a).

123. 845 N.E.2d 1087 (Ind. Ct. App.), *vacated*, 855 N.E.2d 1012 (Ind. 2006). This author represented Mr. Anglemyer in transfer proceedings before the Indiana Supreme Court.

124. *Id.* at 1090.

125. *Gibson v. State*, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006).

126. 852 N.E.2d 22 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

court may impose any sentence within the sentencing range without regard to the presence or absence of such circumstances. “Because the new sentencing statute provides a range with an advisory sentence rather than a fixed or presumptive sentence, a lawful sentence would be one that falls within the sentencing range for the particular offense.”¹²⁷

Two days later, in *Davis v. State*,¹²⁸ a different panel took a different view of the same statutory amendment:

The only purpose of the amendment was to avoid problems with *Blakely v. Washington*, which held that aggravating factors other than criminal history that are not admitted by the defendant must be proven to a jury beyond a reasonable doubt, and *Smylie v. State*, which held that Indiana’s sentencing scheme violated the rule announced in *Blakely*. In our view, this amendment does not alter the fact that one sentence is advised by the General Assembly, and that advisory sentence should therefore be the starting point for a court’s consideration of the sentence that is appropriate for the crime committed.¹²⁹

These two decisions cannot be reconciled, and the divergent approaches may make a significant difference in the resolution of sentencing appeals. Under *Fuller* (as in *Anglemeyer*), the trial court’s finding of aggravating and mitigating circumstances is seemingly unassailable on appeal, while the decades of precedent regarding the finding of aggravators and mitigators remains intact under *Davis*. Although both approaches still allow for a challenge of the appropriateness of the sentence under Appellate Rule 7(B), the *Davis* approach is considerably kinder to defendants by placing a premium on the new advisory sentence as the starting point for appellate review, if not trial court sentencing as well.

The Indiana Supreme Court will ultimately resolve whether sentencing statements are required and the proper scope of appellate review in *Anglemeyer*. There is much more to appellate review of sentences than whether the new advisory term is the starting point in reviewing a sentence. The requirement of a reasoned sentencing statement, a staple of the Indiana criminal justice system, should continue for several reasons.

A. Three Decades of Decisional Law

The iterations of the pre-2005 statute have always set a “fixed” or “presumptive” term and required “if the court finds aggravating circumstances or mitigating circumstances, a statement of the court’s reasons for selecting the sentence that it imposes,”¹³⁰ and provided that trial courts “may” consider

127. *Id.* at 26 (quoting *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005)).

128. 851 N.E.2d 1264 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

129. *Id.* at 1268 n.4 (citations omitted).

130. IND. CODE § 35-38-1-3(3) (2004).

delineated aggravating or mitigating circumstances.¹³¹ Despite this seemingly discretionary language, however, the Indiana Supreme Court has long interpreted these statutes to require that “when a judge increases or decreases the basic sentence, suspends the sentence, or imposes consecutive terms of imprisonment, the record should disclose what factors were considered by the judge to be mitigating or aggravating circumstances.”¹³² More recent cases focus on three requirements for sentencing statements: “a judge must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence.”¹³³ The important purpose behind these requirements “is to guard ‘against arbitrary sentences and provid[e] an adequate basis for appellate review.’”¹³⁴

Hundreds of challenges have been grounded in procedural sentencing errors over the years, and many have proved successful. On the mitigating side, for example, Indiana courts have explained that “a defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea in return.”¹³⁵ A lack of criminal history or longstanding mental illness—when ignored or not credited by trial courts—have similarly led to appellate reversals.¹³⁶ As to aggravators, the “presumptive sentence already assumes the underlying elements and that it is therefore improper to enhance a sentence based on an act for which the defendant is already presumed to be punished.”¹³⁷ Other examples of improper aggravating circumstances include a defendant’s criminal history if comprised of only unrelated misdemeanor convictions,¹³⁸ and victim impact unless it is of a destructive nature not normally associated with the offense.¹³⁹ The sweeping interpretation of the 2005 amendments in *Anglemyer* and *Fuller*—eliminating any need for sentencing statements or the articulation of aggravating and mitigating circumstances—would seemingly overrule all of these cases and principles.

B. Statutory Construction

Anglemyer’s view that the 2005 amendments eliminated the requirement of sentencing statements and explicit findings of aggravating or mitigating circumstances is inconsistent with the language of those amendments. Statutes pertaining to the same subject should be harmonized to produce a logical

131. *Id.* § 35-38-1-7.1(b)-(c).

132. *Gardner v. State*, 388 N.E.2d 513, 517 (Ind. 1979).

133. *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006).

134. *Id.* (quoting *Morgan v. State*, 675 N.E.2d 1067, 1074 (Ind. 1996)).

135. *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004) (revising a fifty-year sentence for child molesting to thirty years).

136. *See, e.g., Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999) (reversing where the defendant lacked criminal history); *Archer v. State*, 689 N.E.2d 678, 685 (Ind. 1997) (reversing where the defendant had a mental illness).

137. *West v. State*, 755 N.E.2d 173, 186 (Ind. 2001).

138. *Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999).

139. *Bacher v. State*, 686 N.E.2d 791, 801 (Ind. 1997).

result.¹⁴⁰ Similarly, “[t]he legislature is presumed to have intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result.”¹⁴¹ Finally, if there is any ambiguity in a penal statute, the amendments must be construed strictly against the State.¹⁴²

Although the *Anglemyer* panel noted an apparent conflict between two statutory provisions, it made no attempt to harmonize those provisions. Instead, the court of appeals grounded its decision largely in the amended language that permits trial courts to impose any sentence that is statutorily and constitutionally permissible “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.”¹⁴³ It noted a “conflict” between this provision and the long-standing provision that trial courts must include “a statement of the court’s reasons for selecting the sentence that is imposed” if it finds aggravating or mitigating circumstances.¹⁴⁴ Nevertheless, the court concluded that the amended statute renders “any error in such a sentencing statement moot.”¹⁴⁵

These statutes can be harmonized, however, by requiring a sentencing statement under section 1-3(3), which does not conflict with section 7.1(d) because that provision specifically requires the sentence to be permissible under statutory and constitutional law. Section 1-3(3) requires a sentencing statement, as does Article VII of the Indiana Constitution, as explained in Part C below. It would be illogical, if not absurd, for the legislature to have retained—and even amended—a lengthy list of aggravating and mitigating circumstances within the statute if it did not intend for trial courts to rely on them in fashioning a sentence.¹⁴⁶ Finally, if there is any doubt about the proper interpretation of these penal amendments, they must be resolved in favor of the defendant—and defendants benefit considerably from the requirement of a sentencing statement and articulation of aggravating and mitigating circumstances.

This view of the statutory language is further bolstered by the “main objective” in construing a statute: “to determine, give effect to, and implement the intent of the legislature.”¹⁴⁷ There is little doubt that these amendments were intended to do nothing more than eliminate the requirement of jury trials for aggravating circumstances in the wake of *Blakely* and *Smylie*.¹⁴⁸ As the amendment’s chief sponsor, Senator Long, explained, “Indiana sentencing procedures [could] be changed to avoid the need for any *Blakely* juries without also working major changes in the substantive pre-*Blakely* sentencing law.”¹⁴⁹

140. *Saintignon v. State*, 749 N.E.2d 1134, 1137 (Ind. 2001).

141. *Sales v. State*, 723 N.E.2d 416, 420 (Ind. 2000).

142. *State v. Downey*, 770 N.E.2d 794, 797 (Ind. 2002).

143. *Anglemyer v. State*, 845 N.E.2d 1087, 1090 (Ind. Ct. App.) (quoting IND. CODE § 35-38-1-7.1(d) (2004)), *vacated*, 855 N.E.2d 1012 (Ind. 2006).

144. *Id.* (quoting IND. CODE § 35-38-1-3(3) (2004)).

145. *Id.*

146. *See supra* note 122.

147. *In re K.G.*, 808 N.E.2d 631, 637 (Ind. 2004).

148. *Anglemyer*, 845 N.E.2d at 1090.

149. *Limrick, supra* note 119, at 22.

Senator Long, and presumably the scores of other legislators who quickly and unanimously passed the legislation, realized that this Court was “committed to uniform sentencing” and they could be “confident that, under the amendment [Long] proposed, appellate review would continue to prevent wide discrepancies in sentences from one court to another.”¹⁵⁰ The 2005 amendments rectified the *Blakely* concerns, but there is no suggestion that they were intended to do anything more, much less any evidence of an intent to fundamentally alter the time-tested statutes and procedures as the court of appeals held in *Anglemyer*.

C. Indiana Constitution

The 2005 amendments also included the requirement that sentences must be “permissible under the Constitution of the State of Indiana”¹⁵¹ *Anglemyer* barely mentions this language and did not attempt to square its holding with the decades of precedent interpreting the Indiana Constitution.

Article VII, sections 4 and 6 of the Indiana Constitution were proposed in the 1960s and took effect as constitutional amendments approved by the voters in 1970.¹⁵² Specific language was added to provide the power to review and revise sentences—a power that was previously not included. “The Commission’s comments demonstrate that the intent of the Amendment was to expand the role of appellate sentence review, not restrict it.”¹⁵³ The purpose was not only to provide for sentence review but for that review to mimic the substantive, nearly *de novo*, review that was occurring in England.¹⁵⁴

The laudable goal of the power to review and revise sentences was well stated in *Serino v. State*: “[A] respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”¹⁵⁵ To that end, sentencing principles have been developed and applied over the years to address disparities.¹⁵⁶ For example, defendants who plead guilty in England may not only challenge their sentence on appeal, “the Court of Appeal has formulated the principle that . . . an offender’s remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor.”¹⁵⁷ The Indiana Supreme Court has taken a similar view, recognizing that an early guilty plea saves the victims from going through a full-blown trial and conserves limited prosecutorial and judicial resources; therefore, it is a mitigating

150. *Id.* at 23.

151. IND. CODE § 35-37-1-7.1(d)(2) (2004).

152. *See Walker v. State*, 747 N.E.2d 536, 537 (Ind. 2001).

153. *King v. State*, 769 N.E.2d 239, 241 (Ind. Ct. App. 2002) (Najam, J., concurring).

154. *See, e.g., Walker*, 747 N.E.2d at 537-38.

155. 798 N.E.2d 852, 854 (Ind. 2003).

156. At the time of the 1970 Amendment, the English system included “a complex and coherent body of sentencing principles and policy,” which had been developed to realize the goal of eradicating disparities in the sentences imposed by trial courts. D. A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 194, 197 (1968).

157. *Id.* at 201.

circumstance entitled to significant weight.¹⁵⁸ Other principles have become ingrained in appellate review, such as maximum sentences should generally be reserved for the worst offenses and worst offenders.¹⁵⁹ The goal of consistency in sentencing and the application of these principles would be difficult, if not impossible, without a sentencing statement from trial courts.

Although Indiana courts have sometimes addressed separately the appropriateness of a sentence under Rule 7(B) from a claim that the trial court's sentencing order failed to include significant mitigating circumstances or included improper aggravating ones,¹⁶⁰ the appellate review and revise power is intimately tied to what occurs in the trial court. The constitutional power places the "central focus on the role of the trial judge, while reserving for the appellate court the chance to review the matter in a climate more distant from local clamor."¹⁶¹ Put another way, appellate sentence review requires a re-examination of all valid aggravating and mitigating circumstances in light of the nature of the offense and character of the offender.¹⁶²

In short, the constitutional review and revise power can only be exercised when trial courts make reasoned sentencing statements that articulate aggravating and mitigating circumstances. In the absence of such statements, no deference may be afforded to trial courts, and it will be exceedingly difficult for appellate advocates to craft sentencing arguments and for appellate courts to engage in meaningful appellate sentence review.

D. Supervisory Power

In addition to the statutory construction and constitutional arguments discussed above, continuing to require trial courts to articulate and weigh aggravating and mitigating circumstances as part of a well-reasoned sentencing statement would be a prudent use of the Indiana Supreme Court's supervisory power over trial courts. Article VII, Section 4 grants the court the power of "supervision of the exercise of jurisdiction by the other courts of the State,"¹⁶³ which has been applied in a variety of contexts in recent years.¹⁶⁴

The court of appeals' opinion in *Anglemyer* urged trial courts to continue making sentencing statements for the laudable reason that "a detailed sentencing statement provides us with a great deal of insight regarding the nature of the offense and the character of the offender from the trial court judge who crafted

158. *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004).

159. *See, e.g., Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998).

160. *See, e.g., Noojin v. State*, 730 N.E.2d 672, 678-79 (Ind. 2000) (applying predecessor rule).

161. *Serino v. State*, 798 N.E.2d 852, 856-57 (Ind. 2003).

162. *See Carter v. State*, 711 N.E.2d 835, 841 (Ind. 1999) (applying predecessor rule).

163. IND. CONST. art. VII, § 4.

164. *See, e.g., Williams v. State*, 690 N.E.2d 162, 169-70 (Ind. 1997) (courtroom security procedures); *Winegeart v. State*, 665 N.E.2d 893, 902 (Ind. 1996) (reasonable doubt instruction).

a particular sentence.”¹⁶⁵ If sentencing statements are optional, some trial judges will make them and others will not; disparity in sentences will result. Such disparity in trial courts will make appellate review “difficult to say the least.”¹⁶⁶

Other practical considerations are worthy of mention as well. As discussed at the oral argument in *Anglemyer*, public confidence and understanding in the criminal justice system are shaken when there are wide disparities in sentences—and worse yet if a defendant with an especially bad criminal record gets a shorter sentence than one who commits the same offense and has no criminal history. The number of appeals will likely skyrocket if trial courts can say anything (or nothing) when imposing a sentence. Defendants are likely to be disgruntled with a cursory sentencing hearing or the imposition of a lengthy prison term with little, or no, explanation from the trial judge. Victims are likely to have a similar reaction to a short sentence imposed without explanation. One objective of appellate sentence review is to

negate the defendant’s perception of the sentencing judge as one who possesses unbridled power over his future. . . . The attitude of the defendant in this regard is not unimportant as a defendant who has an opportunity to air his grievances concerning his punishment is more likely to approach rehabilitation with a positive attitude than one who is convinced that one person wronged him in passing judgment¹⁶⁷

Hundreds of defendants have appealed their sentences in recent years even though trial courts generally explain their reasons in great detail. One can only imagine how many more will appeal their sentences in the coming years if trial courts say nothing in imposing a maximum or near-maximum sentence.

In sum, sentencing has worked well in Indiana for the past three decades in no small part because of the heavy lifting expected of trial courts. When trial courts carefully consider and address the aggravating and mitigating circumstances delineated in the sentencing statutes, many sentences are not appealed and appellate review of those that are appealed can place the “central focus on the role of the trial judge, while reserving for the appellate court the chance to review the matter in a climate more distant from local clamor.”¹⁶⁸ When the trial court says nothing, though, the central focus must necessarily shift to the appellate court, which no longer is *reviewing* a sentence but in effect

165. *Anglemyer v. State*, 845 N.E.2d 1087, 1091 (Ind. Ct. App.), *vacated*, 855 N.E.2d 1012 (Ind. 2006).

166. *Id.* A short step from *Anglemyer*’s holding that trial courts need not find aggravating or mitigating circumstances at sentencing is the abolition of any requirement of an opportunity for defendants (or the State) to submit and argue aggravating or mitigating circumstances. An objection to defendant’s desire to use evidence of mental illness or to make an argument about victim impact may well be sustained; the evidence is arguably not relevant if trial courts may make sentencing decisions without any regard to aggravating and mitigating circumstances.

167. J. Eric Smithburn, *Sentencing in Indiana: Appellate Review of the Trial Court’s Discretion*, 12 VAL. U. L. REV. 221, 223-24 (1978).

168. *Serino v. State*, 798 N.E.2d 852, 856-57 (Ind. 2003).

issuing the sentencing statement that would have ideally come from the trial court.

VI. DEVELOPMENTS OUTSIDE THE SENTENCING REALM

In addition to sentencing, scores of published opinions addressed other issues relating to Indiana criminal law and procedure during the survey period. This brief survey seeks to explore those issues that have had or are likely to have a significant impact on criminal cases—from beginning to end.

A. *Guilty Pleas*

Although guilty pleas are essential to the functioning of overburdened trial courts in particular, they also severely winnow the number of cases appealed. As a general rule, criminal defendants cannot appeal a conviction if they plead guilty.¹⁶⁹ However, two cases from the survey period highlight instances in which defendants can successfully challenge guilty pleas.

Indiana Code section 35-35-1-4(b) governs motions to withdraw guilty pleas made before sentencing.¹⁷⁰ The Indiana Supreme Court has explained that these motions fall into three categories.¹⁷¹ First, trial courts must deny a motion to withdraw a plea if it would “substantially prejudice[]” the State.¹⁷² Second, “[t]he court must allow a defendant to withdraw a guilty plea if ‘necessary to correct a manifest injustice.’”¹⁷³ Finally, in all other cases, the trial court may grant a motion to withdraw a plea “for any fair and just reason.”¹⁷⁴ Although the trial court’s decision, at least in the last category, is reviewed for an abuse of discretion,¹⁷⁵ the supreme court has set forth a general rule that the withdrawal

169. *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996).

170. Indiana Code section 35-35-1-4(b) provides in its entirety:

After entry of a plea of guilty, or guilty but mentally ill at the time of the crime, but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant’s plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

IND. CODE § 35-35-1-4(b) (2004).

171. *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

of guilty pleas before sentencing “should be freely allowed whenever it appears fair or just and motions made within a few days of the initial pleading should be favorably considered.”¹⁷⁶

In *Turner v. State*,¹⁷⁷ the court of appeals addressed whether a defendant could withdraw a plea based on unknown and unknowable circumstances at the time of the plea. There, the defendant pleaded guilty to dealing cocaine only to learn before sentencing of the supreme court’s opinion in *Litchfield v. State*,¹⁷⁸ which held that trash left for collection may not be seized without a showing of reasonable suspicion. Turner asserted that the court’s opinion in *Litchfield* made the withdrawal of the plea “necessary to correct a manifest injustice because a new constitutional rule provides a credible defense against the admissibility of evidence in the State’s case against him.”¹⁷⁹ In reversing the trial court’s denial of the motion to withdraw the plea, the court of appeals agreed that the withdrawal of the guilty plea was “necessary to correct a manifest injustice, namely, the opportunity to assert a previously unavailable constitutional right”¹⁸⁰

Claims such as the one in *Turner* are properly brought on direct appeal, but most challenges to guilty pleas are brought in post-conviction relief proceedings. For example, defendants commonly challenge the voluntariness of their guilty plea through a petition for post-conviction relief. Although these challenges are generally a steep uphill climb, “defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief.”¹⁸¹

In *Cornelious v. State*,¹⁸² the court of appeals considered whether a guilty plea was rendered involuntary when a defendant was misinformed about his ability to challenge the denial of his right to a speedy trial under Criminal Rule 4 by both the trial court and his counsel as part of the guilty plea process. Indiana law does not allow the appeal of pre-trial orders after a guilty plea.¹⁸³ In determining whether the misleading advice was material to the decision to plead guilty, the court looked to the post-conviction court’s findings, which included that the defendant’s “main concern when he pled guilty was the preservation of his ability to appeal his contention that his CR 4 right to a speedy trial had been violated” and that defense counsel made an oral motion for the appointment of counsel at the plea/sentencing hearing “for purposes of examining this Criminal Rule 4 issue.”¹⁸⁴ Concluding that these assurances that Cornelious could plead

176. *Centers v. State*, 501 N.E.2d 415, 419 (Ind. 1986).

177. 843 N.E.2d 937, 941 (Ind. Ct. App. 2006),

178. 824 N.E.2d 356 (Ind. 2005).

179. *Turner*, 843 N.E.2d at 940.

180. *Id.* at 945.

181. *Cornelious v. State*, 846 N.E.2d 354, 357 (Ind. Ct. App.) (quoting *State v. Moore*, 678 N.E.2d 1258, 1266 (Ind. 1997)), *trans. denied*, 860 N.E.2d 585 (Ind. 2006).

182. *Cornelious*, 846 N.E.2d 354.

183. *Id.* at 357 (citing *Branham v. State*, 813 N.E.2d 809, 811 (Ind. Ct. App. 2004)).

184. *Id.* at 360.

guilty and preserve the speedy trial claim were material to the decision to plead guilty, the court reversed the denial of post-conviction relief.¹⁸⁵

As a final point, *Cornelious* reiterated the important distinction between challenging a guilty plea as involuntary and advice given as part of a claim of ineffective assistance of counsel. The former “focuses on whether the defendant knowingly and freely entered the plea, in contrast to ineffective assistance, which turns on the performance of counsel and resulting prejudice,” as discussed in Part D below.¹⁸⁶

B. Confrontation Clause

Seldom do cases from Indiana’s state courts make their way to the United States Supreme Court. *Hammon v. State*¹⁸⁷ made it there and back during the survey period.

Hammon builds on *Crawford v. Washington*,¹⁸⁸ where the Supreme Court held that the prosecution may introduce a “testimonial” out-of-court statement against a criminal defendant only upon two showings: (1) the witness who made the statement is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness.¹⁸⁹ It offered no hard and fast rules defining testimonial statements, which led to some confusion in courts around the country.

In *Davis v. Washington*,¹⁹⁰ the companion case to *Hammon*, the Court shed additional light on the line between testimonial and non-testimonial statements.

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹⁹¹

The statements in *Davis*, which involved a 911 call in a domestic dispute, were not testimonial. The 911 call was one for help in the face of a physical threat; it conveyed events as they were unfolding to enable police to respond and resolve the emergency rather than to document a prior event for possible use in a later prosecution.¹⁹² In contrast, *Hammon* involved hearsay statements in a domestic battery case that recounted what had happened rather than what was

185. *Id.*

186. *Id.* at 358.

187. 829 N.E.2d 444 (Ind. 2005), *rev’d by Davis v. Washington*, 126 S. Ct. 2266 (2006).

188. 541 U.S. 36 (2004).

189. *Id.* at 68.

190. 126 S. Ct. 2266 (2006).

191. *Id.* at 2273-74.

192. *Id.* at 2277.

happening.¹⁹³ Because there was no ongoing emergency and the primary purpose of the officer's questioning was to establish past events potentially relevant to later prosecution, the statements in *Hammon* were testimonial and therefore not admissible at trial.¹⁹⁴

As these and other cases make clear, Confrontation Clause cases often involve some of the most difficult and emotional issues, such as domestic abuse or child molestation. In *Howard v. State*,¹⁹⁵ the Indiana Supreme Court considered whether a deposition could be used in a child molestation trial in which the child victim refused to testify after crying and throwing up.¹⁹⁶ Although reluctant adult victims of domestic violence are "left to the harsh reality of ordinary trial procedures," the procedures for child victims of sexual abuse are considerably different.¹⁹⁷ A prior statement by a child may be admitted at trial if the child is found "unavailable" to testify by the trial court—a finding that may be predicated only upon testimony from a psychiatrist, physician, or psychologist and other evidence that the child will suffer emotional distress, the child cannot participate in the trial for medical reasons, or the child is legally incompetent to testify at trial.¹⁹⁸ If one of these circumstances is met, and the trial court finds sufficient indications of reliability in the out-of-court statement, the statement may be admitted at trial provided the child was available for cross-examination when the statement was made.¹⁹⁹ The supreme court concluded that the trial court erred in finding the child witness unavailable for trial because there was no testimony from a medical professional about the nature of her condition nor did the trial court make a finding that she was unable to participate for medical reasons or was incompetent to testify.²⁰⁰

The question remained, however, whether a discovery deposition provides an adequate opportunity for cross-examination under the Sixth Amendment. Although the court acknowledged the primary motivation for taking a deposition for discovery is not to perpetuate testimony for trial,²⁰¹ it nevertheless concluded that a discovery deposition provided an adequate opportunity for cross examination: "Whether, how, and to what extent the opportunity for cross-examination is used is within the control of the defendant."²⁰²

Defense counsel are thus in a precarious position. Unlike many states, where defense counsel have been warned that required probable cause or preliminary hearings may be viewed as "squandered opportunities" that result in waiver of

193. *Id.* at 2278.

194. *Id.*

195. 853 N.E.2d 461 (Ind. 2006).

196. *Id.* at 463.

197. *Id.* at 466 (quoting *Fowler v. State*, 892 N.E.2d 459, 462 (Ind. 2005)).

198. *Id.* at 467.

199. *Id.*

200. *Id.* at 468.

201. *Id.* at 468-69.

202. *Id.* at 470.

the right to cross-examine if a child later is deemed unavailable,²⁰³ the absence of preliminary hearings in Indiana mean defense counsel are not obligated to speak with a child victim before trial, much less take the child's deposition. If a child seems especially likely to be deemed unavailable for trial, counsel will want to be sure to carefully consider whether to take a deposition, and if one is taken, what should be asked and whether it should be videotaped.

C. Indigent Defendants: Diversion and Payment of Costs of Representation

Although the criminal justice system provides indigent defendants with some of the most basic rights, like counsel, these protections are not always equal to those of non-indigent defendants nor do they necessarily come without a price. Two cases from the survey period highlight these points.

In *Davis v. State*,²⁰⁴ a pro se defendant challenged a trial court's order that he pay more than \$16,000 to the county public defender fund "if at a subsequent time it should be determined" that he has the funds to do so.²⁰⁵ Trial courts have the statutory authority to order defendants "able to pay part of the cost of representation by the assigned counsel" to pay \$100 at the initial hearing and, if proper findings are made, "[r]easonable attorney's fees" at a later time.²⁰⁶ In *May v. State*,²⁰⁷ the court of appeals had remanded an order to pay \$750 to the public defender fund because the trial court did not conduct a hearing regarding the defendant's ability to pay.²⁰⁸ Relying on *May* and the statute, the *Davis* panel held that the trial court did not have "the authority to order a presently indigent defendant to pay restitution based on possible future earnings or other speculative prospective wealth."²⁰⁹

Although the ability of defendants to pay varies considerably from case to case, the court of appeals made clear in another case that prosecutors cannot condition participation in pre-trial diversion programs on an ability to pay required fees.²¹⁰ The Indiana Code permits prosecutors to withhold prosecution of persons charged with misdemeanors if the person agrees to take part in a diversion program, which involves a written agreement that often requires the payment of a fee and participation in a class.²¹¹ In Marion County, defendants were required to pay \$80 for the required class and a \$150 fee to participate in the diversion program. Two defendants who were unable to pay challenged this requirement as a violation of the federal Equal Protection Clause and the Equal

203. *Id.*

204. 843 N.E.2d 65 (Ind. Ct. App. 2006).

205. *Id.* at 67.

206. *Id.* at 68.

207. 810 N.E.2d 741 (Ind. Ct. App. 2004).

208. *Id.* at 745-46.

209. *Davis*, 843 N.E.2d at 68-69.

210. *Mueller v. State*, 837 N.E.2d 198 (Ind. Ct. App. 2005).

211. IND. CODE § 33-39-1-8(c) & (d) (2004).

Privileges and Immunities Clause of the Indiana Constitution.²¹² Specifically, they challenged the policy and practice of the prosecutor's office that denied entry into the program to those unable to pay and removed those who later proved unable to pay the fees from the program.²¹³

Although prosecutors enjoy broad discretion in deciding whom to prosecute, their selection criteria may not be based on "race, religion, or other arbitrary classification."²¹⁴ Supreme Court cases have recognized the impropriety of classifications based on indigency, such as requiring free transcripts for indigent defendants who desired an appeal.²¹⁵ More recently, in *Bearden v. Georgia*,²¹⁶ the Court overruled the revocation of a defendant's probation or parole for failure to pay fines or restitutions without first inquiring into the reasons for that failure and allowing alternative punishments if the person was unable to pay.²¹⁷ Relying heavily on *Bearden*, the Mississippi Supreme Court struck down a prosecutor's "bad check" program that provided for the dismissal of charges when a person promptly paid a \$500 fine and restitution.²¹⁸ Prosecutions proceeded against those unable to pay the hefty fine.²¹⁹ The Mississippi court concluded the program violated the Equal Protection Clause as discrimination against the poor: "Subjecting one to a jail term merely because he cannot afford to pay a fine, due to no fault of his own, is unconstitutional."²²⁰

In *Mueller*, the court of appeals reached the same result, although it provided some specific guidance for prosecutors and trial courts.

It should be no great burden for a court to make such indigency determinations in pretrial diversion cases, should a prosecutor not exercise his or her discretion independently to waive payment of any or all fees without court involvement. If a defendant is found to be unable to pay the fee, either by a prosecutor acting alone or upon a court's determination, he or she must be offered an alternative to full payment of the fee. This could take the form of complete waiver of the fee, partial waiver, implementation of a reasonable payment schedule, replacement of the fee with a non-financial (but reasonable) requirement such as community service, or some combination of partial waiver and a non-financial requirement.²²¹

The case was remanded to allow the trial court to make a determination regarding

212. *Mueller*, 837 N.E.2d at 200.

213. *Id.*

214. *Id.* at 201 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

215. *Id.* at 202 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)).

216. 461 U.S. 660 (1983).

217. *Mueller*, 837 N.E.2d at 203-04 (citing *Bearden v. Georgia*, 461 U.S. 660 (1983)).

218. *Moody v. State*, 716 So. 2d 562, 563 (Miss. 1998).

219. *Id.*

220. *Id.* at 565.

221. *Mueller*, 837 N.E.2d at 205.

the defendants' indigency.²²²

Despite the apparent initial resistance of the Marion County Prosecutor to the notion of offering community service or a fee waiver for indigent defendants, transfer was not sought in *Mueller*. Rather, while the case was pending the prosecutor's office developed a policy to allow defendants to pay the \$150 fee or perform thirty hours of community service.²²³

D. Ineffective Assistance of Appellate Counsel

Like a claim that trial counsel was ineffective, a claim the appellate counsel rendered ineffective assistance requires a showing of (1) deficient performance and (2) that the deficient performance resulted in prejudice.²²⁴ Claims of ineffective assistance of appellate counsel fall into three basic categories: "(1) denial of access to an appeal; (2) waiver of issues; and (3) failure to raise issues well."²²⁵ Defendants seldom prevail on such claims, but two cases during the survey period are worthy of mention not just because the defendant prevailed but because the court's approach suggests relief may be easier to obtain in the future.

In *Gray v. State*,²²⁶ the court of appeals considered a claim from the second category. In such cases, the court considers whether the issue not raised was significant and obvious from the record and whether the issue not raised was "clearly stronger" than the ones raised.²²⁷ Gray argued that appellate counsel should have raised an appellate challenge to the trial court's failure to sever a charge of unlawful possession of a firearm by a serious violent felon ("SVF") from the other charges of murder, attempted murder, and robbery.²²⁸ Trial counsel had requested bifurcation but, when that request was denied, had stipulated that Gray was a SVF. Existing authority from the court of appeals at the time held that a defendant charged only with a SVF charge was not entitled to bifurcation because the prior conviction was an essential element of the offense.²²⁹ The bifurcation issue had not been addressed in a case involving other counts.

Although acknowledging that appellate counsel is not expected to anticipate changes in the law, the court of appeals concluded that appellate counsel was ineffective for failing to raise an undecided issue that was stronger than the issues raised.²³⁰ The court noted that four months after Gray's case was decided on direct appeal, the court of appeals reversed a case in which the trial court refused to sever a robbery charge from an SVF charge because the prejudice

222. *Id.* at 205.

223. Kevin Corcoran, *Legal Fee Biased, Judges Decide*, INDIANAPOLIS STAR, Nov. 17, 2005, at B1.

224. *Fisher v. State*, 810 N.E.2d 674, 677 (Ind. 2004).

225. *Id.* at 677.

226. 841 N.E.2d 1210 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1006 (Ind. 2006).

227. *Id.* at 1214.

228. *Id.*

229. *Id.* at 1216 (citing *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001)).

230. *Id.* at 1217.

associated with the evidence of the prior conviction substantially outweighed its probative value for the non-SVF charge.²³¹ Moreover, although the error did not appear preserved to counsel on direct appeal, the court of appeals concluded that trial counsel had not waived the severance/bifurcation issue by agreeing to the stipulation but rather “was simply abiding by the trial court’s denial of his motions and attempting damage control.”²³²

Although claims of the third variety—failure to raise issues well—are “the most difficult for defendants to advance and reviewing tribunals to support.” When not deemed forfeited on appeal, the court of appeals granted post-conviction relief on that basis in *Hopkins v. State*.²³³ On direct appeal, appellate counsel in *Hopkins* asserted that the multiple convictions for attempted murder and Class A felony robbery violated the Indiana Double Jeopardy Clause because the robberies were elevated based on the same serious bodily injury that supported the attempted murder convictions.²³⁴ Although appellate counsel cited two Indiana Supreme Court opinions as support for her argument that the appropriate remedy was reduction of the robbery convictions to Class C felonies, the court of appeals instead reduced the convictions to Class B felonies.²³⁵ On direct appeal, the court of appeals cited and discussed, as it often does, another case in addition to those cited by *Hopkins*’ counsel in its opinion.²³⁶

On post-conviction review, the court of appeals faulted appellate counsel for not citing two other Indiana Supreme Court cases “that clearly set forth the proper analysis” for the remedy.²³⁷ It concluded that “[c]ounsel should have located and relied upon these cases. We also are confident that had we been directed to such authority, we would have had no choice but to rule in favor of *Hopkins*” in reducing the robberies to Class C felonies.²³⁸ The court did not acknowledge that the direct appeal opinion specifically cited and addressed one of these two cases,²³⁹ or that one of the cases cited by appellate counsel also cited that same case.²⁴⁰

Although it is difficult to criticize the ultimate result in *Hopkins*—the robbery convictions were reduced to Class C felonies, as required by Indiana law—pigeon-holing the claim as ineffective assistance of appellate counsel seems a bit awkward in light of all that appellate counsel did in the case. Appellate counsel asked for the appropriate remedy and cited precedent on point; the court of appeals nevertheless decided the issue incorrectly on direct appeal.

231. *Id.* (citing *Hines v. State*, 794 N.E.2d 469 (Ind. Ct. App. 2003), *adopted by* 801 N.E.2d 634 (Ind. 2004)).

232. *Id.* at 1218.

233. 841 N.E.2d 608, 612 (Ind. Ct. App. 2006).

234. *Id.*

235. *Id.* at 615.

236. *Hopkins v. State*, 747 N.E.2d 598, 604 (Ind. Ct. App. 2001).

237. *Hopkins*, 841 N.E.2d at 613.

238. *Id.* at 614.

239. *Hopkins*, 747 N.E.2d at 604 (citing *Hampton v. State*, 719 N.E.2d 803 (Ind. 1999)).

240. *See Grace v. State*, 731 N.E.2d 442 (Ind. 2000).

The appellate ineffectiveness hook is understandable in light of the narrow category of issues available on post-conviction review.²⁴¹ Nevertheless, the opinion may give hope of relief to other petitioners in the future who discover that their lawyers cited less than all the relevant authority. It may also be read by some appellate lawyers to impose an obligation to string-cite cases or include discussions of multiple cases in arguing a fairly straightforward point of law—both of which are generally frowned upon by the appellate courts.

Not all claims of ineffective assistance of appellate counsel proved successful. Claims that counsel failed to raise an *Apprendi* challenge before *Blakely* was decided have not been well received on ineffective assistance grounds because “*Blakely* radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent.”²⁴² Even if counsel had raised an *Apprendi* claim, the defendant could not show the outcome of the appeal would have been different because *Blakely*—and not *Apprendi*—was viewed as invalidating Indiana’s presumptive sentencing scheme.²⁴³ Although certainly supportable, these decisions lead to an anomalous result. Defendants whose direct appeals pre-dated *Blakely* are not entitled to relief, while those whose sentencing hearings pre-dated *Blakely* (and even *Apprendi*) may be entitled to relief if they failed to pursue a timely direct appeal and instead obtained leave to pursue a belated appeal.²⁴⁴

E. Sentencing After Probation Revocation

As discussed in last year’s survey, the Indiana Supreme Court’s opinion in *Stephens v. State*²⁴⁵ has generated some confusion regarding sentencing after the revocation of probation.²⁴⁶ In *Stephens*, the court held that trial courts revoking probation have the statutory authority to order the imposition of less than the entire length of the sentence originally suspended.²⁴⁷ This was consistent with standard practices in most trial courts and was greeted with a statutory amendment confirming its correctness.²⁴⁸ However, *Stephens* also included additional language mandating that the “total sentence”—the executed time originally imposed and the executed term imposed upon revocation—cannot be “less than the statutory minimum.”²⁴⁹ The source of this rule is difficult to discern from the statute or practice, and the court of appeals confronted the

241. See *Hopkins*, 747 N.E.2d at 611 (reiterating that claims of fundamental error are not available).

242. *Wieland v. State*, 848 N.E.2d 679, 683 (Ind. Ct. App.) (quoting *Smylie v. State*, 823 N.E.2d 679, 687 (Ind. 2005)), *trans. denied*, 860 N.E.2d 590 (Ind. 2006).

243. *Id.*

244. See *supra* notes 77-89 and accompanying text (discussing belated appeals).

245. 818 N.E.2d 936 (Ind. 2004).

246. Schumm, *supra* note 119, at 919-21.

247. *Stephens*, 818 N.E.2d at 941.

248. See IND. CODE § 35-38-2-3(g) (Supp. 2005).

249. *Stephens*, 818 N.E.2d at 942.

confusion it has engendered in *Podlusk v. State*.²⁵⁰

Podlusk was originally sentenced to the statutory minimum sentence of two years, suspended to probation, for Class C felony forgery. The trial court later revoked her probation based on her failure to “communicate honestly” with probation and failure to notify probation that she had moved.²⁵¹ Judge Baker, writing for the majority, acknowledged the language from *Stephens* cited above before observing, “we in no way construe our Supreme Court’s decision in *Stephens* to mean that the trial court was required to impose the entire suspended sentence.”²⁵² The majority relied in part on the probation statute, which imposes no such requirement.²⁵³ Moreover, it noted that some probation violations—such as the relatively minor ones in this case—may not warrant imposition of such a lengthy sentence.²⁵⁴ Finally, the majority concluded by expressing its “hope that the Supreme Court will clarify—and modify, if necessary—its holding announced in *Stephens*, particularly in light of the amended version of Indiana Code section 35-38-2-3(g)(3).”²⁵⁵

Judge Mathias concurred in result, concluding that “the language in *Stephens* is unambiguous” and must be followed by trial courts “[u]nless and until our Supreme Court modifies or clarifies its *Stephens* holding”²⁵⁶ Although the *Stephens*’ language does indeed appear unambiguous, the majority’s suggestion that it be revisited is well-taken in light of both the language of the probation statute and the reality of probation revocation practice, in which executed sentences less than the statutory minimum are often deemed appropriate for especially minor violations.

F. The Anders’ Dilemma

As discussed at length in a previous Survey article,²⁵⁷ appointed appellate counsel will sometimes face a record seemingly devoid of reversible error. For decades, it appears that counsel made the best of the situation with innovation rather than resignation.

In *Packer v. State*,²⁵⁸ appointed counsel opted for the resignation road in an appeal of a revocation of probation. Counsel briefed two “issues,” oddly phrased as his inability to “construct a non-frivolous argument” as to each issue.²⁵⁹ The brief concluded with a statement that “a prayer for relief seems out of place”

250. 839 N.E.2d 198 (Ind. Ct. App. 2005).

251. *Id.* at 199.

252. *Id.* at 201.

253. *Id.*

254. *Id.* at 203.

255. *Id.*

256. *Id.* at 204 (Mathias, J., concurring).

257. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1016-19 (2004).

258. 777 N.E.2d 733 (Ind. Ct. App. 2002).

259. *Id.* at 736.

because of the inability to construct any non-frivolous argument.²⁶⁰ The court of appeals *sua sponte* adopted a new approach for counsel faced with the inability to construct a non-frivolous argument.

[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished [to] the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.²⁶¹

This so-called *Anders* briefing has been a staple of federal practice for a quarter of a century, and some states have employed similar approaches.²⁶² *Anders'* briefs were not part of Indiana practice before *Packer*, and such briefs did seem to gain traction in the years immediately following *Packer*.

Then came *Seals v. State*.²⁶³ In *Seals*, the defendant received an eight year sentence for a Class B felony after pleading guilty. Appellate counsel initially filed a "Report to the Appellate Court" in which he stated there was "no basis for appeal in the instant case" and that he could not "in good conscience further pursue an appeal that Counsel believes would be a frivolous filing"²⁶⁴ The court of appeals responded to this "report" with an order informing counsel that the report did not comply with the requirements of *Anders* and *Packer* and directing counsel to file a complying brief within thirty days.²⁶⁵ Counsel later filed a motion to withdraw his appearance along with a brief that appeared to comply with *Packer*, and the motions panel approved the brief and granted his withdrawal.²⁶⁶ The brief raised three "possible arguments" that had been researched but were determined unlikely to "bear fruit" on appeal.²⁶⁷ The State responded that appointed counsel "did not even attempt to advocate for his client on any of the recognized issues by presenting legal authority, and because he

260. *Id.*

261. *Id.* at 737 (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)).

262. See generally Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection Is More Equal than Others*, 23 FLA. ST. U. L. REV. 625 (1996).

263. 846 N.E.2d 1070 (Ind. Ct. App. 2006).

264. *Id.* at 1073.

265. *Id.*

266. *Id.*

267. *Id.* at 1074.

failed to present a cogent argument, [Seals] can be deemed to have waived all of the issues on appeal.”²⁶⁸

The court of appeals agreed that the “perfunctory ‘possible argument’ demonstrate a lack of commitment and dedication to the client” and expressed further concern that it appeared appointed counsel had not “furnished Seals with a copy of the brief nor had counsel given Seals, who was incarcerated and legally blind, an opportunity to raise any issues of her choosing.”²⁶⁹ In addition, the brief failed to raise the “‘facially obvious issue’ of the appropriateness of” the sentence under Appellate Rule 7(B).²⁷⁰ Accordingly, the court remanded the case “with instructions to appoint replacement counsel for Seals within thirty days” of its decision and directed replacement counsel “to file a new brief on [Seals’] behalf” within ninety days after reviewing the record.²⁷¹

Seals could be cited as proof that the court of appeals—and even the Attorney General—will be diligent in ensuring that an indigent defendant’s right to appeal is protected. An appeal is an adversarial proceeding, however, and one should not rely on the Attorney General to zealously protect the rights of indigent defendants nor should it rely on the court of appeals to do anything more than decide the case before it. Although the Attorney General and the court of appeals should be commended for taking action to protect the rights of a blind, incarcerated defendant, they should not be expected to do so in the future. Appointed counsel should not have the option to abandon a client on appeal. Unless a defendant receives the minimum sentence all suspended with no special conditions of probation, every appeal should present—at a minimum—a plausible challenge to the sentence imposed.²⁷²

268. *Id.* at 1076 (quoting Appellee’s Brief at 5-6).

269. *Id.*

270. *Id.*

271. *Id.* at 1077.

272. *See, e.g.,* *Hole v. State*, 851 N.E.2d 302, 304 (Ind. 2006) (observing that a defendant could challenge the placement of his sentence if the trial court exercised discretion in sentencing). If, however, a defendant received a set plea, there is nothing to appeal, and the proper remedy would be the filing of a motion to dismiss the appeal after consultation with the client.

YEAR IN REVIEW: A SURVEY OF SIGNIFICANT 2006 DEVELOPMENTS IN THE AREA OF LABOR AND EMPLOYMENT LAW AND THE IMPACT UPON INDIANA EMPLOYERS

MARK J. ROMANIUK*

INTRODUCTION

Last year turned out to be an interesting year for developments in the area of labor and employment law in the state of Indiana. Some of these developments have an immediate impact upon Indiana employers while the full impact of other developments will occur over time. This survey attempts to issue spot for the reader and summarize the impact and/or potential impact of the new development. This survey is not intended to be a treatise on Indiana labor and employment law. Readers of the survey are encouraged to analyze the developments discussed within the survey in the context of existing legal precedent.

I hope this survey makes for interesting and informative reading. While the author will continue to monitor the impact of recent developments in labor and employment law, readers of this survey should feel free to contact this author or any of the contributing authors directly if there are any questions regarding the content of the survey.

I. INDIANA WAGE AND HOUR UPDATE

Indiana has long observed the employment-at-will doctrine. This doctrine permits both the employer and the employee to end the employment relationship at any time for “good reason, bad reason, or no reason at all.”¹ Generally, Indiana courts have been, and continue to be, resistant to recognizing exceptions to the doctrine for fear of undermining it. On rare occasions though, exceptions have been acknowledged. Thus, the Indiana Supreme Court in *McClanahan v. Remington Freight Lines, Inc.*² allowed a truck driver to bring a cause of action against his employer after he was fired for refusing to perform what would have been an illegal act. The court reasoned that if an employee could not bring a cause of action under these circumstances, it would encourage law-breaking by

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1. *Montgomery v. Bd. of Trs. of Purdue Univ.*, 849 N.E.2d 1120, 1128 (Ind. 2006).

2. 517 N.E.2d 390 (Ind. 1988).

employers and employees alike.³ In *Frampton v. Central Indiana Gas Co.*,⁴ the court recognized a cause of action for employees allegedly fired for filing a claim for Worker's Compensation.⁵ Exceptions such as these have proven to be atypical over the years, with the overwhelming majority of decisions refusing to recognize additional exceptions to the doctrine.

During this past year, however, Indiana recognized a new exception to the employment-at-will doctrine. Prior to the August 2006 decision of the Indiana Court of Appeals in *Tony v. Elkhart County*,⁶ no Indiana court had recognized a claim of constructive discharge under state law. In *Tony*, however, the court held "that when an employee is discharged, whether expressly or constructively, solely for exercising a statutorily conferred right, an exception to the general rule of at will employment is recognized and a cause of action exists in the employee as a result of the retaliatory discharge."⁷

The plaintiff in *Tony* alleged he was constructively discharged in retaliation for filing a workers compensation claim.⁸ Thus, the court addressed whether filing a worker's compensation claim fell within the public policy exemption to the employment at will doctrine recognized in *Frampton*.⁹ The court concluded that

an employer's acts of creating working conditions so intolerable as to force an employee to resign in response to an employee's exercise of his statutory right to file a worker's compensation claim . . . creates a deleterious effect on the exercise of this important statutory right and would impede the employee's ability to exercise his right in an unfettered fashion without being subject to reprisal.¹⁰

Accordingly, the court held that "constructive discharge in retaliation for filing a worker's compensation claim" fell "within the *Frampton* public policy exception and that a cause of action for constructive retaliatory discharge exists

3. *Id.* at 393.

4. 297 N.E.2d 425 (Ind. 1973).

5. *Id.* at 428.

6. 851 N.E.2d 1032 (Ind. Ct. App. 2006).

7. *Id.* at 1039.

8. *Id.* at 1034.

9. *Frampton* held "that an employee who alleges he or she was retaliatory discharged for filing a claim pursuant to the Indiana Worker's Compensation Act . . . has stated a claim upon which relief can be granted." *Frampton*, 297 N.E.2d at 428. Thus, the court recognized an exception to the employment-at-will doctrine. This opinion also suggested other exceptions to the doctrine were possible when it declared that "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general rule [of employment-at-will] must be recognized." *Id.* at 428. Nevertheless, the supreme court has since reined in this declaration, commenting in *Meyers v. Meyers*, 861 N.E.2d 704, 707 (Ind. 2007) that "[t]he decisions during the intervening thirty years have made it plain that this language is intended to recognize quite a limited exception." This case is discussed *infra* notes 14-17.

10. *Tony*, 851 N.E.2d at 1040.

[when] an employee” can show he was “forced to resign as a result of exercising this statutorily conferred right.”¹¹ “[T]o survive a motion to dismiss, the employee must allege in his complaint that he is entitled to bring a retaliatory discharge claim under an exception to the employment at will doctrine and that he was constructively discharged.”¹² “Tony . . . satisfied these requirements” because he alleged he exercised a statutorily conferred right when he filed workers compensation claims and was subjected to a hostile work environment that forced him to resign.¹³

Outside of this case, Indiana courts have not faltered in their continued support of the employment-at-will doctrine.¹⁴ Recently, in *Meyers v. Meyers*,¹⁵ the court refused to recognize an additional exception to the doctrine. The plaintiff in *Meyers* sought to establish an exception whereby employees would not be precluded from bringing an action alleging retaliatory discharge for exercising a statutory right to receive overtime pay.¹⁶ Citing Indiana’s well established adherence to the employment-at-will doctrine, the court explained that the circumstances of the case did not warrant such an exception.¹⁷ In the past, the instances where exceptions had been made typically “involved plaintiffs allegedly terminated in retaliation for refusing to violate a legal obligation that carried penal consequences,”¹⁸ an element lacking in the plaintiff’s case. The court concluded by reiterating that requests for additional exceptions were generally unavailing as the legislature, not the supreme court, is the branch of government best suited to making such determinations.¹⁹

These cases illustrate the constant struggle between the employment-at-will doctrine and potential exceptions to it. While the decision in *Meyers* reflects a desire to maintain a healthy and robust employment-at-will doctrine unadulterated by numerous exceptions, the *Tony* decision demonstrates circumstances where courts feel compelled to recognize exceptions to right employers’ wrongs. Undoubtedly, the relationship between the doctrine and its exceptions will continue to evolve over the coming years.

11. *Id.*

12. *Id.*

13. *Id.*

14. See, e.g., *Montgomery v. Bd. of Trs. of Purdue Univ.*, 849 N.E.2d 1120, 1128-29 (Ind. 2006) (refusing to recognize an age discrimination exception to the employment-at-will doctrine); *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 892 (Ind. Ct. App. 2007) (declining to “construe employee handbooks as unilateral contracts” and thereby rejecting an attempt to create a “broad new exception to the at-will doctrine for such handbooks”); *M.C. Welding & Machining Co. v. Kotwa*, 845 N.E.2d 188, 195 (Ind. Ct. App. 2006) (refusing to recognize exception in case involving unemployment benefits).

15. 861 N.E.2d 704 (Ind. 2007).

16. *Id.* at 705.

17. *Id.* at 706.

18. *Id.* at 707.

19. *Id.*

A. *Indiana Wage Payment and Wage Claims Statutes*

The past year did generate a number of cases interpreting Indiana's Wage Payment and Wage Claims acts. Most involved questions regarding what constitutes a "wage" and timing issues.

The first of these cases, *Mitchell v. Universal Solutions of North Carolina, Inc.*,²⁰ concerned unused vacation time. At issue was whether employees who had accrued vacation time could, at the time of their discharge, recover those amounts as "wages" despite having signed a policy indicating otherwise.²¹ The court ruled they could not.²² Under the Wage Payment Statute, "employees, upon separation from employment, must be paid the amount due them at their next and usual payday"²³ According to Indiana law, "vacation pay constitutes deferred compensation" that must be paid upon discharge according to the Wage Payment Statute.²⁴ However, this requirement can be avoided so long as an agreement exists between the employer and employee to the contrary.²⁵

Although both plaintiffs had signed policies in their respective employee handbooks indicating that unused vacation pay would not be paid upon termination, the plaintiffs contended that such an agreement was unenforceable.²⁶ Noting that each handbook stipulated that the policies therein were not contracts,²⁷ the plaintiffs therefore argued that the handbook's policies were not enforceable against them.²⁸ The court disagreed, holding that "[i]n this state, a party may not accept benefits under a transaction or instrument and at the same time repudiate its obligations."²⁹ In other words, the court held that the plaintiffs could not claim a right to vacation pay the benefit provided by the employee handbooks while at the same time maintaining that the employee handbooks were unenforceable against them.³⁰

A similar conclusion was reached in *Williams v. Riverside Community Corrections Corp.*³¹ Again, the plaintiff asserted she was entitled, upon discharge, to unused vacation and sick pay. The court of appeals disagreed,

20. 853 N.E.2d 953 (Ind. Ct. App. 2006). The case was a consolidated appeal involving two separate plaintiffs and defendants.

21. *Id.* at 957-58. Both policies stipulated that, under certain conditions, unused vacation pay would not be payable upon termination.

22. *Id.* at 960.

23. *Id.* at 958 (citing IND. CODE § 22-2-5-1 (2004)).

24. *Id.*

25. *Id.* (citing *Ind. Heart Assoc., P.C. v. Bahamonde*, 714 N.E.2d 309, 311-12 (Ind. Ct. App. 1999)).

26. *Id.* at 959.

27. Such statements are customary in employee handbooks because they indicate the employers' intention to maintain an employment-at-will relationship with the employee.

28. *Mitchell*, 853 N.E.2d at 959-60.

29. *Id.* at 959.

30. *Id.*

31. 846 N.E.2d 738 (Ind. Ct. App. 2006).

pointing out that Indiana case law indicates that employers can implement policies which, if agreed to by the employee, prevent the employee from recovering unused vacation pay at termination. As for sick pay, the court indicated that “whether sick leave benefits are wages should be determined on a case-by-case basis.”³² In some instances sick pay is analogous to vacation pay, in which case the same rules apply to each.³³ However, at other times, sick pay is not analogous to vacation pay and does not constitute wages and thus employees are not entitled to recover any amount at their discharge.³⁴ In this case the latter held true.³⁵

An interesting case addressing when an employer is obligated to pay wages under the Wage Payment Statute arose in the case of *David A. Ryker Painting Co., Inc. v. Nunamaker*.³⁶ Originally the painter plaintiff performed work pursuant to a contract and received payment from the defendant for the work. Subsequently, the Department of Labor performed an audit and determined that the plaintiff was entitled to a higher wage than the one he originally received.³⁷ As a result of the audit, the Department ordered the defendant to pay the plaintiff an additional sum of money.³⁸ Fourteen days after the Department issued its order, the defendant paid plaintiff this amount.³⁹ In response, the plaintiff filed a lawsuit under the Wage Payment Statute, alleging that the defendant impermissibly delayed in paying him the full amount as determined by the Department of Labor.⁴⁰ At issue was whether the defendant’s payment was made in a timely matter or whether there was a delay in payment such that the Wage Payment Statute was implicated.

Although the appellate court had held that the plaintiff could recover liquidated damages and attorney’s fees under the Wage Payment Statute, the supreme court reversed.⁴¹ The court ruled that the defendant paid the initial wages in a timely fashion as required by the contract between the parties.⁴² Importantly, it also concluded that the defendant had no obligation to pay additional wages until the Department issued its determination.⁴³ As a result, the defendant’s second payment made fourteen days after this determination was within the time limits of the Wage Payment Statute. Thus, the defendant had fulfilled its statutory obligations and the plaintiff was unable to recover

32. *Id.* at 749.

33. *Id.* at 748-49.

34. *Id.* at 749-50.

35. *Id.* at 750.

36. 849 N.E.2d 1116 (Ind. 2006).

37. *Id.* at 1118. The Department of Labor concluded that the painter was entitled to receive wages at a “skilled” as opposed to “semi-skilled” level. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1120.

42. *Id.* at 1119.

43. *Id.* at 1120.

liquidated damages or attorneys' fees.⁴⁴

Finally, the supreme court has accepted transfer of *Naugle v. Beech Grove City Schools*, a case addressing whether the term "days" in the Wage Payment Statute refers to "business days" or "calendar days."⁴⁵ The Statute itself does not provide a definition.⁴⁶ According to the language of the statute: "Payment shall be made for all wages earned to a date not more than ten (10) days prior to the date of payment."⁴⁷ In other words, the statute provides a ten-day window within which employers must pay wages to their employees. Whether these ten days are considered business days or calendar days is significant because under the former interpretation, an employer essentially has two weeks to pay employees, while under the latter the timeframe is considerably lessened. The implications of the eventual ruling will undoubtedly have a major impact upon the business community.

The court of appeals determined, applying rules of statutory interpretation, that the term meant "calendar days."⁴⁸ Of course, this holding was vacated upon the supreme court's accepting transfer of the case. It remains to be seen how the supreme court might rule on this issue.⁴⁹ A ruling contrary to the appellate court would most definitely serve employers' interests by providing them additional time within which to make payments of wages, and is the more widely accepted interpretation; however, the analysis of the appellate court is also persuasive.

Whatever the supreme court eventually rules in *Naugle* may soon become irrelevant, however, depending upon the outcome of a bill that recently received the General Assembly's approval.⁵⁰ This bill, which is currently awaiting the Governor's signature,⁵¹ would amend the Wage Payment Statute so that the requirement that wages be paid within "ten days" would be interpreted as "ten business days."⁵² Of course, this interpretation would run counter to the court of appeals' holding. Significantly, this bill would also apply retroactively, thereby foreclosing any potential lawsuits prior to the statute's effective date.

B. Indiana's Minimum Wage

Indiana will soon be subject to an increase in the state's minimum wage. House Bill 1027, which was signed by the Governor on May 4, 2007, ties the

44. *Id.*

45. *Naugle v. Beech Grove Elementary Sch.*, 840 N.E.2d 854, 855 (Ind. Ct. App. 2006), *vacated*, 864 N.E.2d 1058 (Ind. 2007).

46. *Id.* at 857.

47. IND. CODE § 22-2-5-1(b) (2004).

48. *Naugle*, 840 N.E.2d at 858.

49. In April 2007, the Indiana Supreme Court reversed the appellate court's ruling, holding instead that the term "days" in the Wage Payment Statute referred to business days. *Naugle v. Beech Grove Elementary Sch.*, 864 N.E.2d 1058, 1068 (Ind. 2007).

50. The bill is S.B. 276, 115th Leg., Regular Sess. (Ind. 2007).

51. Governor Daniels signed this bill into law on April 25, 2007.

52. S.B. 276, 115th Leg., Regular Sess. (Ind. 2007).

state's minimum wage to that of the federal government's minimum wage.⁵³ Because an increase to \$7.25 an hour, up from the current \$5.15 per hour, is planned at the federal level, employers and employees in Indiana will be subject to a similar increase.⁵⁴

II. RECENT DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW

A. General Overview

As a general rule, Indiana follows the doctrine of employment "at-will," under which either party to an employment relationship, absent a binding agreement providing otherwise, may terminate the relationship at any time for any reason.⁵⁵ Accordingly, Indiana employers typically enjoy a high degree of discretion in making employment decisions.

This discretion, however, is not limitless. Several federal employment laws prevent employers from making employment decisions regarding their employees based on certain protected characteristics or status, such as race, color, religion, national origin, sex, age over forty, and disability.⁵⁶ The Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII") generally apply to private employers that employ fifteen or more employees throughout at least twenty calendar weeks of the current or preceding year.⁵⁷ The Age Discrimination in Employment Act ("ADEA") applies to private employers that employ at least twenty workers in the same time period.⁵⁸ Some kinds of employers, such as religious institutions and bona fide private membership clubs, are exempt from federal discrimination statutes.⁵⁹ Federal employment discrimination laws commonly apply to federal employers, such as federal agencies. However, application of federal employment discrimination laws to state public employers is less uniform.

The Indiana Civil Rights Law ("ICRL"), codified in Indiana Code sections 22-9-1-1 through 22-9-1-18, "prohibits discrimination in employment on the basis of race, religion, color, sex, disability, national origin or ancestry and applies to most private and public employers in Indiana."⁶⁰ Additionally, some localities also prevent employers from taking adverse employment actions against employees because of other characteristics not protected by federal law, such as

53. H.R. 1027, 115th Leg., Regular Sess. (Ind. 2007).

54. See Pub. L. 110-28 § 8102, 121 Stat. 112 (2007) (raising the federal minimum wage).

55. *Tony v. Elkhart County*, 851 N.E.2d 1032, 1035 (Ind. Ct. App. 2006).

56. See, e.g., Age Discrimination in Employment Act, 29 U.S.C. § 623 (2000); Americans with Disabilities Act, 42 U.S.C. § 12112 (2000); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (2000); and 42 U.S.C. § 1981 (2000).

57. 42 U.S.C. §§ 2000e(b), 12111(5)(A) (2000).

58. 29 U.S.C. § 630(b) (2000).

59. See 42 U.S.C. §§ 2000e-1, 2000e(b).

60. *Montgomery v. Bd. of Trs. of Purdue Univ.*, 849 N.E.2d 1120, 1130 (Ind. 2006) (citing IND. CODE § 22-9-1-2, -1-3 (2004)).

sexual orientation and gender identity.

The information in this Part will discuss recent legal developments in employment discrimination law over the last two years.

B. Threshold Issues

The Seventh Circuit explained the application of laches defense to Title VII hostile environment action. In *Pruitt v. City of Chicago*,⁶¹ the Seventh Circuit upheld a district court's grant of summary judgment in favor of a defendant against a group of ten plaintiffs alleging hostile environment claims. Plaintiffs alleged that they were subjected to a racially hostile environment by their supervisor for over twenty years. Although the Supreme Court in the familiar timeliness case *National Railroad Passenger Corp. v. Morgan*,⁶² exempted hostile environment claims from the typical 300 day filing requirements strictly applied to claims based on discrete acts, the *Pruitt* court noted that in *Morgan* the Court accorded an equitable laches defense to defendants in hostile environment cases.⁶³

The Seventh Circuit explained that a defendant must prove a laches defense in a Title VII hostile environment claim just as in any other context, by showing: (1) a "lack of diligence" by the plaintiff, and (2) prejudice to the defendant.⁶⁴ The court found that this standard was easily met under the circumstances in *Pruitt*, in which the plaintiffs alleged racial harassment over a period of twenty years, all relevant supervisory employees were either retired, deceased, or otherwise unavailable, and where key documents had been destroyed years before the claim was filed.⁶⁵

Although the court in *Pruitt* upheld the district court's grant of summary judgment in favor of the defendant on the laches basis, the opinion offers litigants cause to believe that a total grant of summary judgment might not be appropriate in future cases. Although laches might bar the advancement of the plaintiffs' hostile environment claims based on some of the alleged discrimination, the court reasoned, the defense could not logically apply to all of the allegations, particularly those occurring so recently that the employer would not be able to show either delay or prejudice.⁶⁶ To hold otherwise, the court explained, would be to find later discrimination inactionable merely because earlier discrimination took place, a fallacy that could not legitimately be advanced in Title VII jurisprudence.⁶⁷ Despite the court's indication that a successful laches defense did not automatically require dismissal of hostile environment claims based on even recent events, the plaintiffs' failure to argue

61. 472 F.3d 925, 927-28 (7th Cir. 2006).

62. 536 U.S. 101 (2002).

63. *Pruitt*, 472 F.3d at 927.

64. *Id.* (quoting *Kansas v. Colorado*, 514 U.S. 673, 687 (1995)).

65. *Id.* at 928.

66. *Id.*

67. *Id.*

on this point was fatal to their case.⁶⁸

C. Defining Adverse Actions in Employment Discrimination Cases

In *Timmons v. General Motors Corp.*,⁶⁹ the Seventh Circuit found that involuntary placement of an employee on disability leave, even while his salary remained the same, so altered his material responsibilities as to constitute an adverse employment action in a disparate treatment claim under the Americans with Disabilities Act.⁷⁰

In *Minor v. Centocor, Inc.*,⁷¹ the Seventh Circuit found that a sales representative whose work hours were extended from fifty-five hours a week to seventy to ninety hours a week suffered a material change in the conditions of her work employment but failed to show it was a result of discrimination.⁷² The court found that “[e]xtra work can be a material difference in the terms and conditions of employment.”⁷³ The court further found that the extra work alleged was material because the employee alleged that she was required to work twenty-five percent longer to earn the same income as before.⁷⁴ Nonetheless, the court affirmed the entry of summary judgment because there was no evidence that the longer work hours were imposed as a result of employee’s sex or age.⁷⁵

D. Curative Measures Do Not Affect Adverse Action Determination

In *Phelan v. Cook County*,⁷⁶ the Seventh Circuit held that an employee was subjected to an adverse employment action for the purposes of her Title VII claim when she was terminated, despite the employer’s decision to reinstate her with backpay four months later.⁷⁷ The *Phelan* court rejected the theory that economic cures such as reinstatement and backpay negated the termination.⁷⁸ Such a rule, the court explained, would permit employers to escape Title VII liability by simply reinstating an employee when doing so had less of a cost impact than facing imminent and costly litigation by a plaintiff.⁷⁹ Because Title VII’s primary objective is to prevent the harm, rather than provide redress, the court explained, the defendant’s later curative actions did not disturb the legitimacy of plaintiff’s claim that she had been subjected to an adverse

68. *Id.* at 928-30.

69. 469 F.3d 1122 (7th Cir. 2006).

70. *Id.* at 1128.

71. 457 F.3d 632 (7th Cir. 2006).

72. *Id.* at 634-35.

73. *Id.* at 634.

74. *Id.*

75. *Id.* at 636.

76. 463 F.3d 773 (7th Cir. 2006).

77. *Id.* at 780.

78. *Id.*

79. *Id.*

employment action.⁸⁰

E. Pretext—Retaliation and Discrimination

In *Forrester v. Rauland-Borg Corp.*,⁸¹ the Seventh Circuit took the opportunity to correct and clarify several decisions regarding pretext in employment discrimination cases. The plaintiff in *Rauland-Borg* was discharged from his employment after a sexual harassment complaint was lodged against him by a female coworker. In support of his argument as to whether the employer's legitimate non-discriminatory reason for his termination, the harassment complaint, was pretextual, plaintiff offered evidence that the investigation performed by the employer regarding the complaint was "shoddy."⁸²

Affirming the district court's grant of summary judgment in favor of the employer, the court once again emphasized that pretext analysis rests solely on the truth of the employer's proffered explanation for its actions, not the wisdom or correctness of such action.⁸³ In so doing, the court turned to repeated "dictum" in several of its employment discrimination opinions stating that pretext can be shown not only where doubt is cast upon the honesty of an employer's reason, but also where a given reason is "insufficient to motivate" the action at issue. This latter expression the court explained, had done little else but confound pretext jurisprudence.⁸⁴ "A pretext, to repeat, is a deliberate falsehood," the court explained.⁸⁵ "An honest mistake, however dumb, is not, and if there is no doubt that it is the real reason it blocks the case at the summary-judgment stage."⁸⁶

*F. Harassment Cases—Non-Employee Harassment of Employees—
Employer Liability Found*

In *Erickson v. Wisconsin Department of Corrections*,⁸⁷ the Seventh Circuit found that an employer could be held liable for the rape of an employee in a minimum security prison, by an inmate of the prison.⁸⁸ Evidence demonstrating that the employee had reported to her supervisor during a social event a previous incident in which the inmate entered employee's work space after regular office hours created a genuine issue of material fact as to whether employer could be held liable under Title VII.⁸⁹

80. *Id.*

81. 453 F.3d 416 (7th Cir. 2006).

82. *Id.* at 417.

83. *Id.*

84. *Id.*

85. *Id.* at 419.

86. *Id.*

87. 469 F.3d 600 (7th Cir. 2006).

88. *Id.* at 605.

89. *Id.* at 607.

*G. Employer Liability—Notice Imputed Beyond Reports
to Designated Individuals*

In a recent case, the Northern District of Indiana found that an employer may be charged with notice of harassment of an employee even where the employee has failed to inform any of the company officials to whom employees were instructed to report harassment.⁹⁰ In *Jean-Baptiste v. K-Z, Inc.*, the plaintiff alleged that he was subjected to a racially hostile work environment by a coworker, thereby requiring him to demonstrate a basis for his employer's liability.⁹¹

With respect to notice of coworker harassment, the court explained, a plaintiff cannot withstand summary judgment without offering evidence of negligence, namely that he gave the employer evidence sufficient to demonstrate to a reasonable employer that he was being subjected to harassment.⁹² Although the plaintiff did not report the harassment to any of the three "point persons" designated by company policy to receive harassment complaints, the court found sufficient evidence warranting employer liability.⁹³ Because the individual to whom the plaintiff complained was a member of management, had allegedly observed some of the harassment, and ultimately terminated plaintiff's employment, plaintiff had reasonable grounds to believe that although he had not reported harassment to a designated "point person," a member of the company with authority to either correct or report the behavior was aware of the unlawful treatment.⁹⁴

III. COVENANTS NOT TO COMPETE

A covenant not to compete is a contract in which one party agrees not to compete with the other. Typically, the agreement not to compete is limited with respect to the activity, time, and geographic area. Although covenants not to compete are generally disfavored, courts will enforce them if the scope of activity, time limitation, and geographic restriction are reasonable.⁹⁵ Accordingly, when a plaintiff seeks to enforce a covenant, the defendant often argues that the covenant is unenforceable because it is unreasonable with respect to the activity, time, and/or geographic area.

Covenants not to compete can arise in the sale of business context (where the seller agrees not to compete with the buyer) or in the employment context (where the employee agrees not to compete with the employer). Additionally, as one of the cases below indicates, they can also arise in the independent contractor context. The following recent cases made new law or clarified or extended

90. *Jean-Baptiste v. K-Z, Inc.*, 442 F. Supp. 2d 652, 675-76 (N.D. Ind. 2006).

91. *Id.* at 673-74.

92. *Id.*

93. *Id.* at 675-76.

94. *Id.*

95. See, e.g., *MacGill v. Reid*, 850 N.E.2d 926, 929 (Ind. Ct. App. 2006).

existing law.

A. *Liquidated Damages*

In *Degani v. Community Hospital*,⁹⁶ the Hospital and the Doctors entered into agreements for anesthesia services containing covenants not to compete (Section 7.1) that provided, in part:

Physician agrees that Hospital shall be entitled to injunctive relief to enforce this covenant, except as provided in the following sentence. Physician and Hospital agree that physician may make a lump sum payment to Hospital of an amount equal to the annual base compensation paid or payable to Physician in the year in which Physician's employment by Hospital is terminated in lieu of Hospital's right to injunctive relief, which sum shall constitute liquidated damages in full for violation of this covenant.⁹⁷

The Doctors sued the Hospital for breaching their agreements, and in its counterclaim, the Hospital sought, among other things:

- (1) declaratory judgment that the Doctors' employment contracts and covenants not to compete [were] valid and [were] in full force and effect;
- (2) a permanent injunction enjoining the Doctors from practicing anesthesiology within twenty miles of [the] Hospital for a period of one year after the end of their employment; [and] (3) damages in an amount equal to the Doctors' annual base salary . . . plus prejudgment interest.⁹⁸

The Doctors denied that their agreements required "payment to the Hospital as liquidated damages an amount equal to their annual base compensation for breach of their restrictive covenants."⁹⁹ Subsequently, the Hospital stipulated that it sought "only those damages set forth in Section 7.1 . . . which [was] an amount equal to the Doctors' annual base salaries . . . plus prejudgment interest."¹⁰⁰

The Doctors alleged that Section 7.1 did not "conform to the definition of [an enforceable] liquidated damages provision," as the plain language afforded them the option of making a lump sum payment to avoid the Hospital's right to seek injunctive relief.¹⁰¹ The court found that a plain reading of Section 7.1 demonstrated that the agreement "afford[ed] the Doctors, not the Hospital, the discretion to make a lump sum payment to the Hospital."¹⁰² Although the agreements characterized the lump sum payment as "liquidated damages," the

96. No. 2:04-CV-398-PRC, 2006 U.S. Dist. LEXIS 1037 (N.D. Ind. 2006).

97. *Id.* at *8.

98. *Id.*

99. *Id.* at *10.

100. *Id.* at *10-11.

101. *Id.* at *11.

102. *Id.* at *16.

court found the “characterization to be improper under Indiana contract law” and noted that interpretation of a contract provision cannot be controlled by erroneous labels.¹⁰³ The court stated that “‘liquidated damages’ applies to a specific sum of money that has been expressly stipulated by the parties to a contract as the amount of damages to be recovered by one party for a breach of the agreement by the other,” which either “exceeds or falls short of actual damages” and that a typical liquidated damages provision provides for the forfeiture of a stated sum of money upon breach without proof of damages.¹⁰⁴ The court noted that the cases cited by the Hospital provided for an automatic forfeiture of a stated sum of money upon breach by a party, whereas Section 7.1 gave the Doctors an option.¹⁰⁵

Additionally, because the Hospital stipulated that it sought only those damages set forth in Section 7.1, the court found that the Hospital “waived or abandoned any right to seek remedies of declaratory judgment, permanent injunction, and any money damages other than liquidated damages.”¹⁰⁶ The court also found that the Hospital was not “entitled to recover liquidated damages under [Section] 7.1.”¹⁰⁷ Accordingly, the court held the Hospital’s counterclaim failed as a matter of law, and “the Doctors [were] entitled to summary judgment on that claim.”¹⁰⁸

B. Independent Contractors and Not-for-Profit Corporations

In *Hope Foundation, Inc. v. Edwards*,¹⁰⁹ Hope was a not-for-profit corporation engaged in the business of training “educators to improve schools and student achievement.”¹¹⁰ Hope provided on-site professional development programs in which it sent consultants to visit a school or school district, and most of the consultants were independent contractors.¹¹¹ Hope and Edwards (a consultant) signed a contract with a non-competition agreement that contained a one year restriction.¹¹² Later, “Edwards’ wife set up a website for Edwards Education Services,” which described “educational leadership services that compete[d] directly with those offered by Hope.”¹¹³ Subsequently, Hope filed an action seeking injunctive relief to prevent Edwards and Edwards Educational Services from competing with Hope for one year.¹¹⁴

103. *Id.* at *16-17.

104. *Id.* at *17.

105. *Id.*

106. *Id.* at *18.

107. *Id.*

108. *Id.*

109. No. 1:06-CV-0439-DFH-TAB, 2006 WL 3247141 (S.D. Ind. 2006) (slip opinion).

110. *Id.* at *1.

111. *Id.*

112. *Id.* at *2-3.

113. *Id.* at *7.

114. *Id.* at *1.

The court recognized that there were “two unusual features about this case.”¹¹⁵ First, the parties did not cite, and the court did not find, any Indiana cases dealing with covenants not to compete as applied to independent contractors.¹¹⁶ The court stated that covenants not to compete were the “most familiar in the context of employment agreements and agreements to sell businesses.”¹¹⁷ The court noted that in a previous case, the Indiana Supreme Court applied the “standards of employer-employee covenants” “[w]here an independent contractor was a corporation acting as an agent for another corporation as a principal.”¹¹⁸ The court also noted that courts in other states “have not adopted a complete prohibition on covenants” not to compete but “have treated such covenants as similar to an employee’s covenant, subject to close scrutiny.”¹¹⁹ The court stated that “[i]n considering the overall issue of reasonableness . . . a court may still consider the specific context, including the nature of the contractual relationship, when deciding whether the covenant seeks to enforce a legitimate, protectable interest, [and that i]f a person is an independent contractor, that fact may signal a greater likelihood that he has brought his own strengths and abilities . . . such that the party seeking to enforce [the covenant] may have a more limited protectable interest.”¹²⁰ Here, the court stated, Edwards was “more like an employee than the [seller of] a business,” and his limited relationship with Hope as a part-time, independent contractor tended to weaken Hope’s protectable interest.¹²¹ The court also noted, however, that Hope had a legitimate interest in its good will and relationships with its customers.¹²²

The second unusual feature of this case, the court stated, was that Hope was not a “for-profit business seeking to protect its profitability,” but rather, “[i]t was founded to spread its ideas about educational reform as widely and as effectively as possible.”¹²³ The parties did not cite, and the court did not find, any “Indiana cases addressing a not-for-profit corporation’s ability to enforce a covenant not to compete.”¹²⁴ The court stated that, looking at cases from other states, there was “no reason to predict the state court would adopt an absolute bar to such cases.”¹²⁵ Moreover, the court noted, because non-for-profit corporations might compete against for-profit corporations (in this case, Edwards Educational Services was set up as a for-profit corporation), it would be unfair if courts “were

115. *Id.* at *8.

116. *Id.* at *9.

117. *Id.* at *8.

118. *Id.* at *9.

119. *Id.*

120. *Id.*

121. *Id.* at *10.

122. *Id.* at *13.

123. *Id.* at *10.

124. *Id.*

125. *Id.*

willing to enforce [covenants] in favor of only the for-profit entities.”¹²⁶ The court also noted that in evaluating the protectable interest of Hope and the public interest as might be affected by a preliminary injunction, the court “should consider its not-for-profit status as part of the relevant circumstances.”¹²⁷ Here, the court stated that the public interest weighed in Edwards’s favor, because schools were in the midst of long-term relationships with him, and if injunctive relief were granted, “[a]nother consultant would have to start over again,” which would “disrupt, delay, and add costs to projects” that were “valuable and important efforts to improve public education.”¹²⁸ Based on all the relevant circumstances, the court denied Hope’s motion for a preliminary injunction.¹²⁹

C. Protectable Interest and Unenforceable Penalty

In *Press-A-Dent, Inc. v. Weigel*,¹³⁰ Weston worked as an independent contractor for Buckley, who owned Press-A-Dent. Weston later “terminated his relationship with Buckley and went into business for himself as ‘Papa Dent’” and was subject to a non-competition agreement with Buckley and Press-A-Dent.¹³¹ Weston and Weigel entered an agreement in which “Weston signed as the co-owner of Papa Dent” and Weigel would work as a contractor and Weston would provide him training.¹³² The agreement contained a non-competition covenant prohibiting Weigel from engaging in any business of any kind that was in competition with Weston during the term of the agreement and two years after its termination.¹³³ It also stated that if Weigel violated or breached the non-competition covenant, Weigel agreed to pay Weston, as liquidated damages, \$50,000.¹³⁴ Subsequently, Weston assigned the agreement to The Dent Man, whose president was Rose, who “was Weston’s girlfriend at the time.”¹³⁵ In May 1999, Weigel terminated the agreement, and, in essence, The Dent Man conducted no business following the termination.¹³⁶ In July 2000, Press-A-Dent purchased the agreement.¹³⁷ In September 2002, “Press-A-Dent filed suit against Weigel, seeking injunctive relief and damages.”¹³⁸ The trial court ruled in favor of Weigel, and Press-A-Dent appealed.¹³⁹

126. *Id.*

127. *Id.*

128. *Id.* at *17.

129. *Id.* at *18.

130. 849 N.E.2d 661 (Ind. Ct. App. 2006).

131. *Id.* at 663.

132. *Id.*

133. *Id.* at 664.

134. *Id.*

135. *Id.* at 665.

136. *Id.* at 666-67.

137. *Id.* at 667.

138. *Id.*

139. *Id.* at 667-68.

The court stated that because The Dent Man essentially ceased all operations when Weigel terminated the agreement, it was reasonable for the trial court to conclude that there was no protectable good will in the company.¹⁴⁰ Therefore, the court stated, Press-A-Dent established no damages as the result of Weigel's alleged breach of the agreement.¹⁴¹ The court also noted that "neither The Dent Man nor Rose took any action to enforce the non-competition provision during the two years that it was arguably in effect."¹⁴² With respect to liquidated damages, the court noted that, in Indiana, "where the liquidated damages are 'grossly disproportionate to the loss which may result from the breach or [are] unconscionably in excess of the loss sought to be asserted, [courts] will treat the sum as a[n] [unenforceable] penalty rather than as liquidated damages.'"¹⁴³ Here, the court stated, "The Dent Man essentially ceased operating after May 1999" and "never demanded that Weigel stop his operations," and because "there was no ongoing business and . . . no good will to protect, The Dent Man failed to show that it sustained any damages as a result of Weigel's actions."¹⁴⁴ The court noted that Weigel's training in Texas cost less than \$2000 and that "receipts could have been submitted to ascertain the cost of the junkyard steel that was used to craft Weigel's tools once he went into business for himself."¹⁴⁵ Therefore, the court stated, "damages could have been calculated with reasonable certainty," and the "liquidated damages provided for in the [] agreement amounted to nothing more than a penalty."¹⁴⁶ The court affirmed.¹⁴⁷

D. Scope of Activity Restriction

In *MacGill v. Reid*,¹⁴⁸ Reid owned Reid's Housekeeping, which provided residential housekeeping services by matching housekeepers, who were independent contractors, to her clients, who were homeowners who wanted their homes to be cleaned. In October 2003, Reid entered into an employment contract with MacGill that provided that MacGill would perform administrative tasks for Reid's Housekeeping's office.¹⁴⁹ The contract contained a covenant not to compete that provided that MacGill agreed "that for a period of two years after termination" of the agreement, MacGill "will not own, manage, or materially participate in any business substantially similar to [Reid's] business within a 25 mile radius of [Reid's] principal business address."¹⁵⁰ "MacGill ended her

140. *Id.* at 669.

141. *Id.*

142. *Id.* at 669-70.

143. *Id.* at 670 (quoting *Czeck v. Van Helsland*, 241 N.E.2d 272, 274 (1968)).

144. *Id.*

145. *Id.*

146. *Id.* at 671.

147. *Id.*

148. 850 N.E.2d 926 (Ind. Ct. App. 2006).

149. *Id.* at 927.

150. *Id.* at 928.

employment with Reid's Housekeeping in March 2005," at which time "Reid had between five to ten housekeepers and 200 clients who were 'mostly located' within twenty-five miles of Reid's business address."¹⁵¹ MacGill subsequently "distributed flyers and obtained one customer for whom she provided 'housekeeping services.'"¹⁵² "In May 2005, Reid filed a complaint for damages and permanent injunction against MacGill," who "argued that the covenant was not to compete unenforceable because Reid had no legitimate protectible interest" and the scope of the covenant was "unreasonably broad."¹⁵³ The trial court ruled in Reid's favor, and MacGill appealed.¹⁵⁴

The court noted that "MacGill knew the names, addresses, and requirements of Reid's clients and housekeeping associates and had acquired an advantage through representative contact with these clients and housekeepers."¹⁵⁵ Thus, the court stated, Reid "demonstrated that Reid's Housekeeping ha[d] a legitimate interest," good will, "worthy of protection by the covenant."¹⁵⁶ With respect to the scope of the covenant, MacGill argued that the covenant was unreasonable because the activity restriction was broader than necessary to protect Reid's good will.¹⁵⁷ MacGill argued that the covenant's provision prohibiting her from managing or owning a housekeeping business, or even working in the housekeeping business altogether, was unnecessary to "protect Reid's goodwill interests" in preserving her customers and housekeepers.¹⁵⁸ MacGill also contended "that the covenant's term restricting her from 'materially participat[ing] in any business substantially similar to [Reid's] business' would prevent her working for another cleaning business in any capacity, such as working as a housekeeper," and therefore was overbroad.¹⁵⁹ The court noted that it had found in other cases that covenants that restricted "an employee from working in any capacity for an employer's competitor or from working within portions of the business with which the employee was never associated to be unreasonable because such restrictions extend[ed] beyond the scope of the employer's legitimate interest."¹⁶⁰ The court agreed

with MacGill that the covenant's provision—restricting her from owning, managing, or materially participating in any business substantially similar to Reid's Housekeeping—would prevent her from being employed in any capacity by any other cleaning business and [was] unreasonable because it extend[ed] beyond the scope of Reid's

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 930.

156. *Id.*

157. *Id.*

158. *Id.* at 931.

159. *Id.* (internal citation omitted).

160. *Id.* at 932.

Housekeeping's good will interest of protecting its current customers and housekeepers.¹⁶¹

The court reversed.¹⁶²

IV. WORKER'S COMPENSATION ACT

The Indiana Worker's Compensation Act¹⁶³ (the "Act") forges compromises between the employer and the employee by allowing employees to recover benefits without having to show fault or negligence on the part of the employer. With each passing year, the Indiana General Assembly makes changes to the Act and Indiana courts continually interpret the Act making new law or extending or affirming existing law. The survey period of 2006 was no different.

A. Legislative Changes Affect the Act

House Bill 1307 was introduced and ultimately passed into law during the 2006 General Assembly Session. The Bill impacts a number of provisions in the Act. One of most significant changes was the legislative change, overruling the court's decision in *Milledge v. Oaks*.¹⁶⁴ The amendment now explicitly provides that the burden of proof of the element of a claim is on the employee, and that "proof by the employee . . . does not create a presumption in favor of the employee with regard to another element of the claim."¹⁶⁵ The amendments also provide for increases in the: (1) average weekly wage used to calculate worker's compensation and occupational disease benefits; (2) schedule for awarding compensation for the degree of permanent partial impairment determined by the board; and (3) maximum compensation that may be paid for personal injury by accident or disablement or occupational disease.¹⁶⁶ The amendment also establishes a new schedule for attorneys fees¹⁶⁷ and deletes an exception to and revises the statute of limitations to a straightforward two-year statute of limitations for the making of a modified award of worker's compensation benefits.¹⁶⁸

B. Indiana Courts Interpret the Act

The full Workers Compensation Board (the "Board") can determine the dates for which compensation was payable instead of condition claims where no such findings were agreed upon by parties. In *Stump Home Specialties Manufacturing*

161. *Id.*

162. *Id.* at 933.

163. IND. CODE §§ 22-3-1-1 to -12-5 (2004).

164. 784 N.E.2d 926 (Ind. 2003).

165. *See* IND. CODE §§ 22-3-2-2(a), 22-3-7-2(a) (2004) (amended by 2006 Ind. Legis. Serv. P.L. 134-2006 (West)).

166. *See id.* §§ 22-3-3-10, 22-3-3-22, 22-3-7-19.

167. *See id.* § 22-3-1-4.

168. *See id.* § 22-3-3-27.

v. Miller,¹⁶⁹ employee was injured on May 23, 2001 and was paid temporary total disability (“TTD”) up to April 9, 2003.¹⁷⁰ Following the receipt of medical treatment and, upon reaching maximum medical improvement (“MMI”), employee received a permanent partial impairment (“PPI”) rating of twenty-three percent.¹⁷¹ The parties executed a Form 1043 Agreement to Compensation pertaining to this PPI rating, noting the date of injury and the date upon which disability began. In the section of the Agreement allowing the parties to perform the PPI calculations, the parties stated “23% PPI of foot x 35 [degrees] = 8.05 x 1,100 a degree = \$8,855.00.”¹⁷² The parties failed to indicate in the Agreement the period for which compensation would be paid.¹⁷³ The Agreement was approved by the Board on April 25, 2003. Employee subsequently filed an Application for Adjustment of Claim seeking an increased PPI award for his change of condition.¹⁷⁴

This omission by the parties was a crucial error. The court noted that the statute of limitations for a change of condition case for increased PPI runs “one year from the last day for which compensation was paid.”¹⁷⁵ The Indiana Supreme Court has recently clarified that the statute of limitations in Indiana Code section 22-3-3-27 begins to run on the last day “for which” payments are made and not the last date “on which” payments were made.¹⁷⁶ Typically, as a practical matter, the parties commonly add language to the PPI calculation in the Agreement that indicates the award is payable between a starting and ending date. Here, the parties failed to identify the dates the award was payable.¹⁷⁷ The defendant employer argued that a start date for the payment of PPI benefits was implied on the date disability began by mere virtue of the fact that the date of disability was referenced on the Agreement. The defendant employer also argued that, historically, payment of PPI award commences on the date of the injury and, accordingly, the starting date for the payment of the award should be the date of injury unless the parties specify otherwise.

The court noted that Indiana law is devoid of any decision or statute providing that the date of injury is *always* the starting date for payment of the PPI award. In considering the evidence, the Full Board determined that absent an agreement by the parties, the PPI award is payable starting on the date the

169. 843 N.E.2d 18 (Ind. Ct. App. 2006).

170. *Id.* at 19.

171. *Id.*

172. *See id.*

173. *Id.* at 20.

174. *Id.* at 19.

175. *See id.* at 21 (citing IND. CODE § 22-3-3-27(c) (2004)) (The court’s interpretation of the statute at issue was prior to the effective date of the legislative change but the legislative change does not affect the basic holding of the case).

176. For further discussion about this distinction, see generally *Prentoski v. Five Star Painting, Inc.*, 837 N.E.2d 972 (Ind. 2005).

177. *Stump Home Specialities Mfg.*, 843 N.E.2d at 20.

employee reached MMI.¹⁷⁸ The Board reasoned that the PPI should be considered paid from the date of MMI because the PPI rating itself cannot be determined until the date of MMI. Accordingly, under the Full Board's analysis, the employee's Application was timely.¹⁷⁹ On appeal, the court found the Board's reasoning to be logical and consistent with their authority pursuant to Indiana Code section 22-3-4-5 which grants the Board authority to determine "the period for which payments shall be made."¹⁸⁰

The practical impact of this case is that it allows the Board to expand the statute of limitations in change of condition cases if the parties fail to properly complete the Form 1043 Agreement to Compensation. It is certainly acceptable to begin the payment of the PPI award from the date of the injury but, as *Stump Home Specialties Manufacturing* demonstrates, a failure to do so may result in the Board beginning the payment of the PPI award at a much later date—the date the employee reaches MMI. The result is of course a longer tolling of the now two year statute of limitations under Indiana Code section 22-3-3-27 for increased impairment.

C. Court of Appeals Addresses Dual Employment

In *Wishard Memorial Hospital v. Kerr*,¹⁸¹ the court of appeals once again muddled the waters on the issue of dual employment in the context of temporary agency employees.¹⁸² Jenni Kerr ("Kerr") was a registered nurse who was directly employed by CareStaff, Inc., ("CareStaff") a temporary staffing agency for nurses.

On September 12, 2002, CareStaff executed an agreement with Wishard [Memorial Hospital ("Wishard")] for Kerr to work at Wishard, beginning on September 16 and ending on October 12, 2002. The agreement listed the specific dates and times that Kerr was expected to work and referred to Kerr as a "CS [CareStaff] Employee." Kerr was assigned to work in Wishard's psychiatric emergency room.¹⁸³

"On October 1, 2002, Kerr was [leaving] Wishard after completing a shift when she slipped and fell on a freshly waxed floor, resulting in injuries. Kerr

178. *Id.*

179. *Id.*

180. *Id.* at 21-22 (citing IND. CODE § 22-3-3-27(c) (2004) (amended by 2006 Ind. Legis. Serv. P.L. 134-2006 (West))).

181. 846 N.E.2d 1083 (Ind. Ct. App. 2006).

182. Dual employment issues in the context of worker's compensation cases have had a tendency to generate fractured rulings from the court of appeals. *Cf. Jennings v. St. Vincent Hosp. & Health Care Ctr.*, 832 N.E.2d 1044 (Ind. Ct. App. 2005) (involving almost identical facts as *Wishard* but reaching an entirely different conclusion and finding dual employment existed in *Jennings*. Interestingly, the dissenting judge in the *Jennings* decision was on the panel deciding *Wishard*).

183. *Wishard Mem'l Hosp.*, 846 N.E.2d at 1086-87.

applied for and received worker's compensation benefits from CareStaff's insurer. She also filed a complaint" for Damages in civil court alleging negligence against Wishard, but made no indication in the Complaint that she was an employee of Wishard.¹⁸⁴ "Wishard moved to dismiss the complaint for lack of subject matter jurisdiction, alleging that [her claim] was barred by the exclusivity provision of the [Worker's Compensation Act ("Act")] because Wishard" was an employer of Kerr.¹⁸⁵ The trial court denied the motion and Wishard pursued an interlocutory appeal.

The court noted at the outset that the Act "'provides the exclusive remedy for recovery of personal injuries arising out of and in the course of employment.'"¹⁸⁶ The Act further provides that an employee may simultaneously have more than one employer sometimes known as dual employment particularly in the context of temporary employees.¹⁸⁷ In determining whether an employee-employer relationship exists, the courts will engage in a balancing test involving the following seven factors: "(1) the right to discharge; (2) the mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries."¹⁸⁸

In analyzing the seven factors, the court concluded that the factors which weighed in favor of an employee-employer relationship were: Wishard had the right to discharge Kerr, and Wishard provided the tools and equipment for Kerr to perform her job duties.¹⁸⁹ The factor which weighed against a finding of the existence of such a relationship was the fact that Kerr was not paid by Wishard and did not receive any Wishard benefits.¹⁹⁰ The court found there was conflicting evidence on the fourth and fifth elements, whether the parties believed an employee-employer relationship existed and control.¹⁹¹ In evaluating the length of employment, the court noted that the longer the employment the more likely an employee-employer relationship exists. Here, Kerr had a finite term of four weeks for which she would work at Wishard which weighed against a finding of employee-employer relationship. The work boundaries appeared clear to the court to be confined to the Wishard Hospital building which would normally support a finding of an employee-employer relationship. Accordingly, the court found that the factors were split on the finding of dual employment and held that Wishard failed to carry its burden of establishing that Kerr was indeed

184. *Id.* at 1087.

185. *Id.*

186. *Id.* (quoting IND. CODE § 22-3-2-6 (2004)).

187. *See* IND. CODE § 22-3-3-31.

188. *Wishard Mem'l Hosp.*, 846 N.E.2d at 1087-88 (citing *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991)).

189. *Id.* at 1088-99.

190. *Id.* at 1099.

191. *Id.* at 1089-92.

an employee of Wishard.¹⁹²

Finally, the court noted that “the remedies provided in the [] Act are in derogation of common law, and a statute that is in derogation of common law must be strictly construed against limitations on a claimant’s right to bring suit.”¹⁹³ While the court recognized a strong public policy favoring the coverage of employees under the Act, “this policy is not advanced where its effect ‘immunize[s] third-party tortfeasors and their liability insurers from liability for negligence which results in serious injuries to one who is not in their employ.’”¹⁹⁴ It appears that these public policy concerns influenced the court’s decision on the issue of dual employment in this case.

D. Provider Fee Application Dismissed

“On May 1, 2003, Dr. Danielson filed an Application for Adjustment Of Claim for Provider Fee (Application) with the Indiana Worker’s Compensation Board . . . alleging that [employer,] Pratt Industries, owed him \$2357.50 for emergency medical services performed on Huang Tien Hsiao,” an alleged employee of Pratt Industries on June 24, 2000.¹⁹⁵ In *Danielson v. Pratt Industries, Inc.*,¹⁹⁶ the court addressed whether the Board’s dismissal of Danielson’s Application for lack of jurisdiction was proper.

The full Board affirmed the hearing judge’s findings that Huang Tien Hsiao did not file an Application within the two year statute of limitations and, thus, any claim by him would be time barred under Indiana Code section 22-3-3-3. Additionally, since Huang Tien Hsiao failed to timely file a claim and “the Board would lack jurisdiction over any such claim, the Board similarly lacks jurisdiction over Danielson’s Application. Danielson argued that “the Board erred in determining that it did not have jurisdiction to entertain his Application.”¹⁹⁷ Specifically, Danielson argued that the two year statute of limitations contained in the Worker’s Compensation Act “does not apply to applications for medical provider fees, therefore, his claim should be subjected to the six-year time limitation under [Indiana Code section 34-11-2-7].”¹⁹⁸

In affirming the full Board, the court noted that “[i]n order to collect the costs of reasonable medical services from the ‘Employer’” a physician “must provide services, treatment, or supplies to an ‘Employee.’”¹⁹⁹ The court reasoned that in the instant case, there had never been a determination that “Tien Hsiao was an ‘Employee’ of Pratt or that Pratt was an ‘Employer’ of Huang Tien

192. *Id.* at 1093.

193. *Id.* (quoting *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016, 1018 (Ind. 1995)).

194. *Id.* (quoting *GKN Co. v. Magness*, 744 N.E.2d 397, 404 (Ind. 2001)).

195. *Danielson v. Pratt Indus., Inc.*, 846 N.E.2d 244, 245 (Ind. Ct. App. 2006).

196. *Id.* at 244.

197. *Id.* at 246-47.

198. *Id.* at 247.

199. *Id.* (citing IND. CODE §§ 22-3-3-4(d), 22-3-6-1(i) (2004)).

Hsiao.”²⁰⁰ Without those determinations, the court found that Danielson does not qualify as a ‘Medical Service Provider.’”²⁰¹ The court also reinforced the Board’s determination that it did not have jurisdiction to address whether Danielson could bring his claim under Indiana Code section 34-11-2-7 by indicating that the Board “did not err in its finding because nowhere in [Indiana Code section 22-3-1-3] is the Board delegated authority to increase the two year time limitation for filing claims found in [Indiana Code section 22-3-3-3].”²⁰²

The Board is overwhelmed with the increase in the filing of Provider Fee claims and, perhaps this case will spark some enforcement of the elements of proof on the part of the providers. It also provides case law support to weed out the claims without merit or where the provider has failed to collect first from the employer.

E. Presumptive Dependents Include Unborn Children Under the Worker’s Compensation Act

In *First Student, Inc. v. Estate of Meece*,²⁰³ mother, as personal representative of putative father’s estate, filed a wrongful death action against bus company and its driver after driver struck and killed putative father while he was in the course and scope of his employment. The Defendant filed a motion for partial summary judgment, claiming that child born to mother after putative father’s death was not a “dependent child” under the wrongful death statutes, because mother did not timely file a paternity action within eleven months following putative father’s death.²⁰⁴

The putative father’s death gave rise to worker’s compensation liability as he was acting in the course and scope of his employment at the time of his death. On December 8, 2003, the mother filed an action in the Decatur Circuit Court titled “Verified Petition for Appointment of Guardian and Authorization to Compromise and Settle Minors’ Claims.”²⁰⁵ In that settlement, the employer of the putative father offered to resolve the worker’s compensation claim for the unborn child and one-year-old child of the putative father for a sum of \$100,000. In approving the compromise agreement, the Decatur court required the mother to establish paternity after the birth of the child and report the findings to the court.²⁰⁶ The question before the court was whether the paternity action in the worker’s compensation case, which was filed within eleven months after the death, is the equivalent to a paternity action in the intestacy statutes for purposes of the wrongful death statutes.

The court noted that the worker’s compensation statutes include in the

200. *Id.*

201. *Id.* (citing IND. CODE § 22-3-6-1(i) (2004)).

202. *Id.*

203. 849 N.E.2d 1156 (Ind. Ct. App. 2006).

204. *Id.* at 1159.

205. *Id.* at 1157.

206. *Id.* at 1158.

definition of a presumptive dependent “acknowledged children born out of wedlock,” whereas, the relevant intestacy statute provided that although a mother’s testimony regarding paternity may be received into evidence to establish “paternity” or “acknowledgement,” the mother’s testimony “must be supported by corroborative evidence or circumstances.”²⁰⁷ Prior case law has held that in order for “an illegitimate child to be considered a presumptive defendant under the worker’s compensation statutes,” “both the fact of paternity and acknowledgement must be established.”²⁰⁸

In its analysis of the issue at hand, the court stated that it was “unable to find any specific definition of precisely what is required to prove the fact of paternity in a worker’s compensation case.”²⁰⁹ Ultimately, the court concluded “that the standard of proof for the factual determination of paternity in a worker’s compensation claim is effectively the same as that used under the paternity statutes.”²¹⁰ Additionally, the court concluded that the standard of proof therefore requires that the “mother’s testimony be corroborated in some way.”²¹¹ The worker’s compensation standard then, also meets the requirements of a “paternity” action as contemplated by the intestacy statutes.²¹²

F. Ingress & Egress Re-Evaluated

The court addressed the issue of ingress and egress in *Mueller v. DaimlerChrysler Motors Corp.*²¹³ Keith Mueller (“Mueller”) “parked his vehicle at the Kokomo Mall . . . and was crossing Boulevard Street to report to work at DaimlerChrysler when” he was struck and killed by an oncoming vehicle.²¹⁴ The employer provided parking for its employees in an adjacent lot not intersected by any public street and employer policy prohibited employees from parking in the mall parking lot.²¹⁵ The employer did not own, lease, or maintain the mall parking lot and exerted no control over the mall parking lot. Mueller’s widow filed for worker’s compensation death benefits arguing that his death occurred while acting in the course and scope of his employment.

Relying on *Clemans v. Wishard Memorial Hospital*,²¹⁶ Mueller pointed out that the court in *Clemans* recognized that “the Act should be liberally construed to accomplish the purpose for which it was enacted, and that employment necessarily includes a reasonable amount of time and space before and after

207. *See id.* at 1163, 1160 (citing IND. CODE §§ 22-3-3-19, 29-1-2-7 (2004)).

208. *Id.* at 1164 (citing *Goins v. Lott*, 435 N.E.2d 1002 (Ind. Ct. App. 1982)).

209. *Id.*

210. *Id.*

211. *Id.* at 1165.

212. *Id.*

213. 842 N.E.2d 845 (Ind. Ct. App. 2006).

214. *Id.* at 846.

215. *Id.*

216. 727 N.E.2d 1084 (Ind. Ct. App. 2000).

ceasing actual employment.”²¹⁷ “[C]ourts have created a public policy exception to the rule to extend coverage of the Act to those accidents resulting from employees’ ingress to or egress from their employer’s operating premises or extensions thereof.”²¹⁸ Mueller argued that the court should extend the same rationale applied in *Clemans* to the case at bar. The court, however, declined to do so.²¹⁹

In distinguishing *Clemans* from the facts at hand, the court noted that in *Clemans* the employee worked in one building and parked in an employer provided lot.²²⁰ The lot was accessible through a series of tunnels connecting the various building on Wishard’s campus but was more easily accessible by crossing a public street. The *Clemans* court noted that it was within the employer’s contemplation that employees would cross the public street as the “most convenient and reasonable means of ingress and egress from its operating premises.”²²¹ Here, the employer clearly prohibited the employees from parking in the mall lot and the lot itself was not an extension of the employer’s operating premises. The employer in *Mueller* provided employee parking adjacent to its building which did not require the employees to subject themselves to the risks of crossing a public street. Accordingly, the court declined to extend the ingress and egress exception.²²²

G. Worker’s Compensation Act Bars Third-Party Spoliation of Evidence Claims by Employees Against Employers

In *Glotsbach v. Froman*,²²³ an employee died when an electric pump he was working with exploded. Soon after the accident, an owner of the Company discarded the pump, despite being instructed not to do so by an Indiana Occupational Safety and Health Administration (“IOSHA”) Officer.²²⁴ The employee’s estate filed a wrongful death complaint against the Company, “designer, manufacturer, and distributor of the pump.”²²⁵ “The Estate later amended the complaint to add claims against [the Company] for negligent and intentional spoliation” of evidence and punitive damages.²²⁶

On transfer, the supreme court unanimously held that an employee who suffers injuries covered by the Worker’s Compensation Act has no claim against his or her employer for third-party spoliation of evidence relevant to claims

217. *Mueller*, 842 N.E.2d at 848-49 (quoting *Clemans*, 727 N.E.2d at 1086).

218. *Id.* at 849.

219. *Id.*

220. *Id.*

221. *Id.* at 849 (citing *Clemans*, 727 N.E.2d at 1088).

222. *Id.*

223. 854 N.E.2d 337 (2006).

224. *Id.* at 338.

225. *Id.*

226. *Id.*

arising from the accident.²²⁷

In arriving at its holding, the supreme court relied on *Gribben*²²⁸ for the proposition that “Indiana common law does not recognize an independent cause of action for either intentional or negligent ‘first-party’ spoliation of evidence, i.e., spoliation by a party to the underlying claim.”²²⁹ *Gribben* “expressly held open the question whether Indiana law recognized a tort of spoliation by third parties,” but concluded that existing remedies for first-party spoliation claims were sufficient to deter and redress first-party spoliation.²³⁰

With regard to the estate’s third-party spoliation claim, the supreme court affirmed the court of appeals’ reasoning in *Murphy v. Target Products*.²³¹ *Murphy* found that “there is no common law duty on the part of an employer to preserve, for an employee, potential evidence in an employee’s possible third party action” and dismissed the plaintiff’s spoliation claim.²³²

Applying *Murphy*, the supreme court rejected the estate’s argument that the employer’s knowledge of the employee’s situation and circumstances surrounding the accident constituted a special relationship sufficient to confer upon the Company a duty to preserve the evidence.²³³ The court observed that “an employer will virtually always be aware of an injury occurring in the workplace.”²³⁴ Therefore, as a practical matter, that knowledge would always confer upon the employer the duty to preserve evidence for an employee’s use in “potential litigation against third parties.”²³⁵ Moreover, IOSHA’s instruction to the Company to retain the pump did not confer a duty on the Company because IOSHA did not make any reference to the need to preserve the evidence for the employee’s use in private litigation. “[T]o the extent that IOSHA’s request created any duty to preserve evidence, it was a duty” the Company owed to IOSHA, not to the employee or his estate.²³⁶ Further, the court rejected the estate’s argument that the foreseeability of harm caused by the Company’s failure to retain the pump supported the recognition of a duty because it is the “relationship of the parties, not foreseeability,” that might lead to a permissible third-party spoliation claim.²³⁷

Lastly, the court stated, “most importantly, as in *Gribben* we think the policy considerations are the controlling factor in refusing to recognize spoliation as a tort under these circumstances.”²³⁸ While acknowledging that evidentiary

227. *Id.* at 341-42.

228. *Gribben v. Wal Mart Stores, Inc.*, 824 N.E.2d 349 (Ind. 2005).

229. *Glotsbach*, 854 N.E.2d at 338 (citing *Gribben*, 824 N.E.2d at 355).

230. *Id.* at 339.

231. 580 N.E.2d 687 (Ind. Ct. App. 1991).

232. *Glotsbach*, 854 N.E.2d at 339 (quoting *Murphy*, 580 N.E.2d at 690).

233. *Id.*

234. *Id.*

235. *Id.* at 340.

236. *Id.*

237. *Id.*

238. *Id.* at 341.

inferences are not available as a remedy for third-party spoliation, the court emphasized that several other remedies remain applicable.²³⁹

Certainly, recognizing a third-party spoliation claim against employers would foster many disadvantages including trials of third-party spoliation claims wherein proving damages is highly speculative; imposition or cumbersome, operations-interfering requirements on employers to retain or not repair equipment; and encouragement of satellite litigation against employers that the Worker's Compensation Act is designed to foreclose. Accordingly, the Indiana Supreme Court's decision preventing a third-party claim of spoliation by the employee against the employer appears to be in line with the purpose and intent of the Act.

H. An Innocent Victim of Horseplay by Others Is Entitled to Worker's Compensation Benefits

In *DePuy, Inc. v. Farmer*,²⁴⁰ an employee "started to clock out at the end of his shift" and "brushed his timecard against his [co-worker's] side."²⁴¹ The co-worker, "who weighed approximately 470 pounds, yelled at [the employee], pinned him against a machine, and bent him backwards over it."²⁴² The employee, Anthony Farmer ("Farmer"), "sustained severe injuries to his back, resulting in lost work, surgery and medical bills."²⁴³

Farmer requested worker's compensation benefits in the amount of \$58,556 in medical expenses, \$3,312 for eight weeks [of TTD], and \$16,250 for twenty-five percent [PPI]. He also filed a civil suit against [the co-employee] for battery and against his employer for negligence. The trial court dismissed the civil claim against [the Company] on the basis that the [Act] barred a civil tort claim against the [] employer for injuries sustained in this workplace incident.²⁴⁴

The Company was unsuccessful in dismissing the Worker's Compensation claim as arising from "horseplay" not governed by the Act.

After the co-employee

paid Farmer \$3,000 to settle the battery suit, [the Company] renewed its motion to dismiss the worker's compensation claim, this time on the ground that it had not consented to the agreement between Farmer and [his co-employee]. The Hearing Judge agreed that the Worker's Compensation Board lacked jurisdiction as a result of Farmer's "third-party settlement" with his co-employee. The Board reversed the Hearing Judge but directed Farmer to remit the \$3,000 settlement sum to [the

239. *Id.* at 341-42.

240. 847 N.E.2d 160 (Ind. 2006).

241. *Id.* at 163.

242. *Id.*

243. *Id.*

244. *Id.*

Company] as a condition to maintaining his worker's compensation claim.²⁴⁵

The issues presented to the supreme court on transfer were whether the Worker's Compensation Board "erred when it affirmed the Hearing Judge's finding that Farmer's injuries arose out of his employment"; whether Farmer's settlement with his co-employee in the civil suit barred his Worker's Compensation claim; and whether Farmer was entitled to an increased award pursuant to Indiana Code section 22-3-4-8(f).²⁴⁶

On the first issue, the supreme court agreed with the court of appeals "that a participant in horseplay is not entitled to worker's compensation because the horseplay is not for the benefit of the employer and therefore does not arise out of the employment, but an innocent victim of horseplay by others is entitled to worker's compensation benefits."²⁴⁷ The supreme court found that "Farmer's acts were reasonable conduct in this work setting and did not provoke [the co-worker's] attack."²⁴⁸ "Farmer's injuries were incurred while he was performing services for [the employer]" as he was walking toward the time clock to end his shift at the time of the attack.²⁴⁹

On the second issue, the court held that "[n]o third-party tortfeasor case has squarely addressed the situation . . . where a tort claim was settled for less than the apparent worker's compensation benefits before the worker's compensation claim was resolved."²⁵⁰ The court of appeals held that Section 13 of the Act did not bar Farmer's Worker's Compensation claim. The court concluded that "by its terms, section 13 does not apply to a claim against a fellow employee."²⁵¹ "[A]lthough an absolute statutory bar is not applicable to a recovery against a fellow employee, equitable subrogation rights nevertheless give [the Company] the right to offset any recovery from [the co-employee] against its worker's compensation liability . . . [I]f an employee settles without the approval of [the Company] (or its carrier), the employer (or carrier) is free to challenge the amount received as inadequate."²⁵²

Regarding the third issue of statutory award increase, Farmer contended that he was "entitled to an increased award pursuant to Indiana Code section 22-3-4-8(f) which provides: 'An award of a the full board affirmed on appeal, by the employer, shall be increased thereby five percent (5%) and by order of the court may be increased 10%.'"²⁵³ Taking into consideration the fact that the delay in

245. *Id.*

246. *Id.* at 163-64.

247. *Id.* at 164 (citing *Fields v. Cummins Employees Fed. Credit Union*, 540 N.E.2d 631, 638 (Ind. Ct. App. 1989)).

248. *Id.*

249. *Id.*

250. *Id.* at 168.

251. *Id.* at 169.

252. *Id.* at 169-70.

253. *Id.* at 171.

this case was nearly twice the time consumed by most cases from injury to final determination on appeal, the supreme court determined that a “delay of over a decade warrants an additional five percent even if . . . the employer in good faith raises fairly debatable issues.”²⁵⁴

*I. Worker’s Compensation Benefits Can Be a Marital Asset
Subject to Distribution*

In *Shannon v. Shannon*,²⁵⁵ “Husband and Wife were married sometime during the 1990s. In October 2000, husband sustained an injury at work.”²⁵⁶ Subsequently, he “received a lump sum worker’s compensation payment in the amount of \$48,000. In January 2003, Wife filed a petition for dissolution of marriage. Husband submitted a property division worksheet and proposed that wife be awarded” several items totaling \$42,000 of the marital estate.²⁵⁷ Husband proposed that he be awarded his Worker’s Compensation Award, among other things, totaling \$53,500 of the total marital estate. After a hearing, the trial court included his Worker’s Compensation Award in the marital pot and awarded the wife \$10,000 out of that award.²⁵⁸ “Husband contend[ed] that the trial court erred” when it did so.²⁵⁹

Worker’s Compensation benefits received during the marriage to replace earnings of that period are a marital asset subject to distribution.²⁶⁰ “Only to the extent that worker’s compensation benefits replace earnings *after* the date that the dissolution petition is filed do the benefits remain separate property.”²⁶¹ “Because Husband did not present any evidence regarding what portion of the award was not marital property, he [could not] overcome the strong presumption that the trial court’s disposition of marital property [was] correct.”²⁶² The court of appeals held “that the trial court’s property distribution in this case [was] sufficiently close to the attempted fifty-fifty split.”²⁶³ The court of appeals affirmed the decision of the trial court, awarding “Husband approximately fifty-two percent of the marital pot.”²⁶⁴

254. *Id.* at 172.

255. 847 N.E.2d 203 (Ind. Ct. App. 2006).

256. *Id.* at 204.

257. *Id.*

258. *Id.* at 204-05.

259. *Id.* at 205.

260. *Id.* (citing *Leisure v. Leisure*, 605 N.E.2d 755, 759 (Ind. 1993)).

261. *Id.*

262. *Id.* at 206.

263. *Id.*

264. *Id.*

J. Constructive Discharge in Retaliation for Filing Worker's Compensation Claim Falls Within Public Policy Exception to Employment-at-Will Doctrine

In *Tony v. Elkhart County*,²⁶⁵ Randy Tony ("Tony") "was employed by Elkhart County as a highway maintenance worker. During his employment with [the] County, Tony was involved in two work related accidents in which he sustained bodily injuries that required surgery and physical therapy. [Additionally], Tony's physicians placed him on work restrictions."²⁶⁶ Tony alleged that from the onset of his claim, Elkhart County Management was hostile and "'ridiculed' Tony by calling him a 'faker' and implying that he was 'malingering.'"²⁶⁷ According to Tony, his "employment with Elkhart County ended when he was 'constructively discharged.'"²⁶⁸

Tony filed a complaint against [the] County and alleged that he had been "constructively discharged . . . in retaliation for [his] worker's compensation claims." Elkhart County filed a motion to dismiss under Indiana Trial Rule 12(b)(6) and argued that Tony's complaint should be dismissed for failure to state a claim upon which relief could be granted because Indiana did not recognize a claim for constructive retaliatory discharge.²⁶⁹

The trial court granted Elkhart County's motion to dismiss. The sole issue was whether the trial court erred by dismissing Tony's Complaint.

In establishing the public policy exception to Indiana's doctrine of employment at will, the Indiana Supreme Court in *Frampton*,²⁷⁰ "held that the worker's compensation statute created a public policy in favor of an employee filing a worker's compensation claim."²⁷¹ The court concluded that an

employer's acts of creating working conditions so intolerable as to force an employee to resign in response to an employee's exercise of his statutory right to file a worker's compensation claim also creates a deleterious effect on the exercise of this important statutory right and would impede the employee's ability to exercise his right in an unfettered fashion without being subject to reprisal. Thus, [the court held] that a constructive discharge in retaliation for filing a worker's compensation claim falls within the *Frampton* public policy exception and that a cause of action for constructive retaliatory discharge exists for an employee that can show that he has been forced to resign as a result of exercising this statutorily conferred right.²⁷²

265. 851 N.E.2d 1032 (Ind. Ct. App. 2006).

266. *Id.* at 1034.

267. *Id.*

268. *Id.*

269. *Id.* at 1034-35.

270. *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973).

271. *Tony*, 851 N.E.2d at 1035 (citing *Frampton*, 297 N.E.2d at 427-28).

272. *Id.* at 1040.

The significance of this case is obvious as it affirms a cause of action for constructive retaliatory discharge in Indiana for the filing or pursuit of worker's compensation benefits and gives disgruntled employees an opportunity to seek damages for what the employee perceives as intolerable conditions giving rising to his or her voluntary departure from the employment.

K. Court Unwilling to Require Prejudgment Interest on Worker's Compensation Award

In *Bowles v. Griffin Industries*,²⁷³ Roger Bowles ("Bowles") "visited Dr. Ronald G. Bennett complaining of back problems, bilateral leg pain, and difficulty walking."²⁷⁴ Approximately four years later, "Bowles, while employed full time by Griffin as a driver, injured his lower back 'in an accident arising out of and in the course of his employment' for Griffin. Griffin paid Bowles [TTD] benefits and statutory medical benefits" for approximately the next three years.²⁷⁵ "A hearing before a member of the Board was conducted [a year later and] the member found that Bowles was permanently partially impaired (PPI) as a result" of the injury.²⁷⁶ Two years after that, Bowles had been paid the remainder of the benefits he was entitled to for his permanent total disability.

"On January 29, 2004, Bowles . . . filed an application for benefits from Indiana's Second Injury Fund. . . . In July of 2004, a single member of the Board granted Bowles entry into the Second Injury Fund . . . but denied his request for retroactive admittance."²⁷⁷ This cause was set up and "continued by the parties in this case multiple times over a span of 11 (eleven) years due to multiple reasons including failure of the Plaintiff . . . to timely respond to discovery requests."²⁷⁸

"In February 2005, while his second appeal was pending, Bowles submitted a stipulated record and requested that the Board order an award of interest. By then, Griffin had paid Bowles, through its worker's compensation insurance carrier, medical expenses of \$129,652.68, [TTD] of \$16,627.26, . . . permanent total disability of \$106,585.00 . . . and [PPI] of \$6,600."²⁷⁹ "Bowles asserted that Griffin's insurer 'very belatedly paid worker's compensation disability benefits' and that these tardy payments violated the Act's requirement of 'payment of a specific weekly disability sum on a specific schedule of weekly dates.'"²⁸⁰ Bowles also contended "that the 'delinquent' payments deprived him of the 'timely use of funds to which he [was] entitled' while simultaneously allowing Griffin and its insurer 'to enjoy the investment use and benefit' of 'improperly

273. 855 N.E.2d 315 (Ind. Ct. App. 2006).

274. *Id.* at 316.

275. *Id.*

276. *Id.* at 317.

277. *Id.*

278. *Id.*

279. *Id.* at 318.

280. *Id.* at 319 (quoting Appellant's Brief).

withheld' funds."²⁸¹ "In addition, he maintain[ed] that the Act 'constitutes a contract between employer and employee, and the employer must discharge its contractual liability by paying such benefits at the time or times, and in the amount or amounts, provided for in the contract.'"²⁸²

The court, understanding Bowles' time value of money argument, held that "neither the Act nor the case law mandates the payment of interest under the circumstances presented."²⁸³ The court stated that "[h]ad the Legislature intended that administrative officers clothed with authority to carry out the provisions of the law might allow interest from the date of death in addition to the amounts fixed by way of compensation, it undoubtedly would have made a provision to that end."²⁸⁴ The court noted that "the Legislature has amended the Act numerous times, but has never added a provision requiring pre-judgment interest on a worker's compensation award."²⁸⁵ The Indiana Court of Appeals determined that it had "no authority to read in such a requirement."²⁸⁶

L. Employer's Obligation to Pay Medical Expenses Does Not Extend Beyond Two Years of Accident Date

In *Colburn v. Kessler's Team Sports*,²⁸⁷ Bill Colburn ("Colburn") "sustained an injury to his lower back during the course and scope of his employment with Kessler's Team Sports ("Kessler's"). . . . Kessler's worker's compensation insurance carrier, 'accepted the claim as compensable and provided [] Colburn with medical care.'"²⁸⁸ Colburn subsequently was treated by Dr. Vedantam and Dr. Brahmbhatt, and underwent an Independent Medical Evaluation ("IME"). Colburn returned to see Dr. Vedantam for a follow-up visit on November 12, 2004, several months after his August 12, 2002 injury.²⁸⁹ In the interim, Kessler's Worker's Compensation insurance carrier was liquidated, and "Colburn's claim was transferred to the Indiana Insurance Guaranty Association ("IIGA") on August 26, 2004. An IIGA representative . . . authorized payment" for the treatment prescribed by Dr. Vedantam on Colburn's follow-up visit to him.²⁹⁰ "[W]hen Colburn subsequently sought authorization for surgery, [the IIGA Representative] informed him that the statute of limitations had run on his claim under [the Act]. Because Colburn had not filed an application for adjustment of his claim, [the Representative] denied him authorization for the

281. *Id.*

282. *Id.* (quoting Appellant's Brief).

283. *Id.* at 320.

284. *Id.* at 321.

285. *Id.*

286. *Id.*

287. 850 N.E.2d 1001 (Ind. Ct. App. 2006).

288. *Id.* at 1003.

289. *Id.* at 1004.

290. *Id.*

surgery.”²⁹¹

“On December 13, 2004, Colburn filed an application for adjustment of claim against Kessler’s. Kessler’s moved to dismiss the application, alleging that the Board lacked jurisdiction over Colburn’s claim because the statute of limitations had run in August 2004.”²⁹² The Full Board ultimately affirmed the decision of a single hearing member who dismissed Colburn’s Application. “Colburn contend[ed] that the Full Board erred when it found his application for change of condition was not timely filed.”²⁹³

“Here, Colburn sustained his back injury on August 12, 2002, so the two-year statute of limitations ran on August 12, 2004. Because he did not file his application for adjustment of Claim until December 2004, it was not timely filed.”²⁹⁴ Colburn argued “that the term ‘compensation’ as used in Indiana Code [s]ection 22-3-3-3 does not include payments for medical treatment. Thus, Colburn maintain[ed] that the two-year statute of limitations [did] not apply to his request for medical benefits.”²⁹⁵

The court reasoned that

because an adjudication of permanent impairment must be made within the two-year statute of limitations under Indiana Code [s]ection 22-3-3-3, an employer’s obligation to pay medical expenses does not extend beyond two years from the accident date absent an agreement or Board decision otherwise. Here, because there was no temporary total disability or adjudication of permanent impairment within the two-year statute of limitations, Kessler’s was not obligated to pay Colburn’s medical expenses after August 12, 2004.²⁹⁶

The court concluded that “the statute of limitations on claims for medical services is two years under Indiana Code [s]ection 22-3-3-3.”²⁹⁷

Colburn also asserted that “Kessler’s had a duty to get a permanent partial impairment (“PPI”) determination within two years from the date of his accident, which Kessler’s failed to do. Colburn contend[ed] that had Kessler’s timely obtained a PPI rating, then a disagreement might have arisen over compensation, which would have permitted him to timely file an application for adjustment of claim.”²⁹⁸ The court “reject[ed] Colburn’s contention that Kessler’s had a duty to timely obtain a PPI rating.”²⁹⁹

Finally, Colburn contended that “[a] harmonious construction of the two statutes [Indiana Code sections 22-3-3-3 and 22-3-4-5] is impossible to achieve

291. *Id.*

292. *Id.* at 1004-05.

293. *Id.* at 1005.

294. *Id.*

295. *Id.*

296. *Id.* at 1006.

297. *Id.*

298. *Id.* at 1007.

299. *Id.*

without affording employers a tremendous loophole by which they could lawfully avoid providing future medical services for compensable injuries, as well as compensation for permanent partial impairment.”³⁰⁰ The court declined “Colburn’s invitation to so construe the Act based on public policy considerations.”³⁰¹ Particularly instructive was the fact that “Colburn ha[d] not demonstrated that anything prevented him from resolving or preserving his claim prior to the expiration of the two-year statute of limitations.”³⁰² He “made the decision, more than once, to forego surgery.”³⁰³ “Had [he] decided to undergo surgery earlier, he would have likely obtained a PPI prior to the expiration of the statute of limitations which would have expedited the claim process.”³⁰⁴

“In sum, [the court held] that under the circumstances of this case, the Board’s decision barring Colburn’s application for adjustment of claim does not violate public policy.”³⁰⁵

M. Conclusion

The courts and the legislature addressed many significant issues affecting Indiana practitioners in the area of worker’s compensation in the survey period. We look forward with anticipation to the upcoming changes in the next year and the impact these changes will ultimately bring.

V. SELECTED DEVELOPMENTS IN TRADITIONAL LABOR LAW

In contrast to other areas of employment law, practitioners addressing the relationship between management and organized labor rarely look to federal or state courts for guidance.³⁰⁶ Rather, it is often the decisions of the National Labor Relations Board (“Board”)³⁰⁷ that demarcate the posts and fences that mark off the ever-developing landscape of traditional labor law. Accordingly, this Survey section will discuss select Board decisions that are sure to impact the relationship between Indiana employers and organized labor.

300. *Id.* at 1007-08.

301. *Id.* at 1008.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. Indeed, state laws regulating many aspects of the labor-management relationship are preempted by the National Labor Relations Act (“Act”). *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (“When an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”).

307. At all relevant times during the Survey period, the Board consisted of Chairman Robert J. Battista and members Peter C. Schaumber, Wilma B. Liebman, Peter N. Kirsanow and Dennis P. Walsh.

A. Supervisory Status

In a landmark trilogy of cases decided in October of 2006,³⁰⁸ a divided Board³⁰⁹ set out guidelines for deciding supervisory status after the Supreme Court's decision in *Kentucky River Community Care*.³¹⁰ In *Oakwood*, the lead case among the three, the Board assessed a claim that certain of an employer's charge nurses were supervisors under Section 2(11) of the National Labor Relations Act.³¹¹ The Board described its holding in *Oakwood* as an effort to provide "clear and broadly applicable guidance for the Board's regulated community" as to the meanings of the following three terms listed in Section 2(11): "independent judgment," "assign" and "responsibly to direct."³¹² Prior to *Oakwood*, Board law concerning the application of these terms had been more vague than any other area of the Board's jurisprudence.

The *Oakwood* Board began by establishing that it refused to "engage in an analysis that seems to take as its objective a narrowing of the scope of supervisory status."³¹³ First, the Board held that to "assign" as used in Section 2(11) means the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.³¹⁴ Thus, in the health care setting, to "assign" would include an employee's act of assigning nurses or other caregivers to particular patients.³¹⁵ Then, after establishing that "assign" and "responsibly direct" were distinct terms,³¹⁶ the Board defined the authority to responsibly direct to mean that the worker has "'men under him' . . . and decides 'what job shall be undertaken next or who shall do it'"³¹⁷ and is "accountable for the performance of the task."³¹⁸ To be found to be accountable, the Board held that it must be shown that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary" and that "there is a prospect of adverse consequences for the putative supervisor" resulting from his or her direction of other employees.³¹⁹

308. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (2006); *Croft Metals, Inc.*, 348 N.L.R.B. No. 38 (2006); *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. No. 39 (2006).

309. In a strongly-worded dissent, Members Liebman and Walsh described the *Oakwood* decision as "among the most important in the Board's history." *Oakwood*, 348 NLRB No. 37 at 25.

310. 532 U.S. 706 (2001).

311. *Oakwood*, 348 N.L.R.B. No. 37 at 1.

312. *Id.*

313. *Id.* at 3.

314. *Id.* at 4.

315. *Id.*

316. *Id.*

317. *Id.* at 7.

318. *Id.* at 8.

319. *Id.*

Next, the Board held that to exercise “independent judgment,” a worker must “at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”³²⁰ The Board further determined that in order to constitute “independent judgment,” the requisite amount of discretion exercised must be more than “routine or clerical.”³²¹ Finally, the Board held that in order to be found to be a “supervisor” under the Act, the worker must spend “a regular and substantial portion of his/her work time performing supervisory functions.”³²² The Board defined regular to be “according to a pattern or schedule” and substantial as “at least 10-15 percent of their total work time.”³²³ After applying these standards, the Board found that Oakwood’s charge nurses were supervisors as defined in the Act.³²⁴ Thus, the Board’s decision in Oakwood is considered to be a victory for employers.

The Board first applied *Oakwood*’s principles in *Avante at Wilson, Inc.*³²⁵ In *Avante*, the Board concluded, “contrary to the Regional Director, that the Employer . . . failed to establish that [the petitioned-for] staff nurses” were supervisors.³²⁶ The Board found that the nurses did not possess supervisory authority with respect to (1) disciplining certified nursing assistants (“CNAs”) by sending them home and (2) exercising their authority to adjust CNAs’ grievances.³²⁷

The Board found that the staff nurses did not possess supervisory authority with respect to disciplining CNAs because the record evidence (the CBA covering the CNAs and the employee handbook) did not support a finding of authority to send CNAs home.³²⁸ To satisfy the *Oakwood* standard, the employer’s witnesses would have to state (1) when incidents of CNAs being sent home occurred, as well as “who was involved, what the alleged insubordination consisted of, whether high [] level managers had been consulted, or whether the

320. *Id.*

321. *Id.*

322. *Id.* at 9.

323. *Id.*

324. *Id.*

325. 348 N.L.R.B. No. 71 (2006). However, several ALJ decisions have applied *Oakwood*. See, e.g., GFC Crane Consultants, Inc., 2007 WL 486711 (N.L.R.B. 2007) (port engineers not supervisors because directions given by them did not rise above the status of routine or clerical functions); RCC Fabricators, Inc., 2007 WL 313431 (N.L.R.B. 2007) (finding employees to be supervisors because they possessed the powers to assign, effectively recommend assignment, discipline (including suspend, layoff, and discharge), and effectively recommend discipline); Talmadge Park, Inc., 2007 WL 174480 (N.L.R.B. 2007) (laundry worker is not a supervisor, as she does not assign or responsibly direct using independent judgment); J. Shaw Assocs., LLC, 2006 WL 3890287 (N.L.R.B. 2006) (sandwich store manager was not a supervisor because she could not assign or discipline and performed no other supervisory function).

326. *Avante at Wilson, Inc.*, 348 N.L.R.B. No. 71 at 1.

327. *Id.* at 1, 5.

328. *Id.* at 2.

situation was anything more than a one-time occurrence.”³²⁹ In other words, evidence was needed of specific situations or details of circumstances where a staff nurse ordered a CNA to leave the facility. None was presented here.

The Board also found there to be insufficient evidence to support the Regional Director’s conclusion that the staff nurses had supervisory grievance-adjustment authority.³³⁰ Even though (1) the contract directed employees to present grievances to their “immediate supervisors” for adjustment and a CNA testified her immediate supervisor was a staff nurse; (2) the staff nurses’ job description stated they supervised CNAs and “serve[d] as [management’s] representative during the first step of the [employer’s] problem solving process”; and (3) a former staff nurse testified she personally resolved disputes between CNAs, the Board held that no evidence demonstrated that staff nurses actually participated in adjusting grievances.³³¹ According to the Board, “[m]erely being informed of a dispute between two CNAs does not indicate that staff nurses adjust or in any other way handle the problems at issue let alone establish the requisite independent judgment necessary to confer supervisory status.”³³² Therefore, the employer failed to satisfy its burden of proof and the Board concluded that the staff nurses were not supervisors.³³³

*B. Select Unfair Labor Practice Decisions—Polling Employees
About Union Sentiments*

In *Unifirst Corp.*,³³⁴ the Board reversed an ALJ’s finding that the employer violated Section 8(a)(1) of the Act by polling employees about their union sentiments while a decertification petition was pending.³³⁵ In coming to this conclusion, Members Battista and Schaumber stated that since an employer that is presented with evidence of actual loss of majority status may lawfully withdraw recognition even if a decertification petition is pending,³³⁶ and employer presented with the same evidence could lawfully poll employees.³³⁷

In *Unifirst*, the union filed unfair labor practice charges against the employer postponing a decertification election. An employee then circulated a petition demanding that the employer hold its own election.³³⁸ The general manager at

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* at 3.

333. *Id.*

334. 346 N.L.R.B. No. 52 (2006).

335. *Id.* at 2.

336. See generally *Renal Care of Buffalo*, 347 N.L.R.B. No. 112 (2006) (finding that the employer possessed the necessary proof that the union had actually lost majority support and withdrawal of recognition was lawful because half the employees in the bargaining unit signed a decertification petition).

337. *Unifirst Corp.*, 346 N.L.R.B. No. 52 at 3.

338. *Id.* at 1.

the facility received a copy of this petition, which carried signatures of a majority of bargaining unit members. The employer then decided to conduct a poll.³³⁹ It was conducted in accordance with the requirements established by the Board in *Struksnes Construction Co.*,³⁴⁰ which held that an employer is permitted to poll employees about their union sentiments only if: “(1) the poll’s purpose is to determine the truth of a union’s claim of majority status, (2) this purpose is communicated to the employees, (3) employer assurances against reprisal are given, (4) employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.”³⁴¹ The last criterion is limited to unfair labor practices that can be shown to have caused the loss of employee support for the union.³⁴² Additionally, the employer provided the union with advance notice of the poll’s time and place, as required by *Texas Petrochemicals*.³⁴³

The poll resulted in thirty-seven employees voting against continued union representation and twenty-one employees voting for representation.³⁴⁴ Based on these results, the employer notified the union that it was withdrawing recognition. The Board held that the employer did *not* violate the Act by polling employees or by polling them while the decertification petition was pending. Instead, this poll was conducted in order to avoid a violation of the Act and “the [employer’s] conduct here was entirely consistent with the Supreme Court’s suggestion in *Allentown Mack* that an employer that *could* lawfully withdraw recognition might want to poll first to secure conclusive evidence that the union in fact lost majority support, as well as to maintain good employee relations, which otherwise might be harmed by an abrupt withdrawal.”³⁴⁵ In the Board’s view, when an employer may choose not to continue recognition and wants to ensure that a withdrawal of recognition is lawful, “that employer may lawfully poll its employees to make sure that the Union in fact no longer enjoys majority status” so long as the poll “complies with the procedural safeguards articulated in *Struksnes*.”³⁴⁶

339. *Id.*

340. 165 N.L.R.B. 1062 (1965).

341. *Unifirst*, 345 N.L.R.B. No. 52 at 16 (citing *Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 1063 (1965)).

342. The relevant factors in determining whether a causal relationship exists between the unfair labor practices and loss of employee support for a union include: (1) length of time between the unfair labor practices and loss of employee support for the union; (2) nature of the violations, including the possibility of lasting and detrimental effect on employees; (3) tendency of the violations to cause employee disaffection with the union; and (4) effect of the unlawful conduct on the employees’ morale, organizational activities, and union membership. *Olson Bodies, Inc.*, 206 N.L.R.B. 779 (1973); *Master Slack Corp.*, 271 N.L.R.B. 78 (1984).

343. *Unifirst*, 346 N.L.R.B. No. 52 at 16 (citing *Tex. Petrochemicals*, 296 N.L.R.B. 1057, 1063 (1989)).

344. *Id.* at 2.

345. *Id.* at 5.

346. *Id.*

C. Surveillance Rights of Unions and Employers

The Board's decision in *Randell Warehouse of Arizona, Inc.*,³⁴⁷ further clarified the Board's precedent regarding surveillance of employees engaged in union organizational activities. Specifically, Chairman Battista and Members Schaumber and Kirsanow held that "photographing employees engaged in Section 7 activity," in the absence of a valid explanation conveyed to employees in a timely manner, "constitutes objectionable conduct whether engaged in by a union or an employer."³⁴⁸

In *Randell II*, the Board concluded that the rationale applicable to holding employers and unions to different standards with respect to surveillance could not "withstand careful scrutiny."³⁴⁹ Rather, "[T]he rationale for finding that unexplained photographing has a reasonable tendency to interfere with employee free choice applies regardless of whether the party engaged in such conduct is a union or an employer."³⁵⁰ In coming to this conclusion the Board stated:

In the context of an election campaign, the union seeks to become (or remain) the express representative of the unit employees. To achieve this goal, the union must convince a majority of employees to vote in its favor. A reasonable employee would anticipate that the union would not be pleased if he or she failed to respond affirmatively to the union's efforts to enlist support, just as an employee would anticipate that an employer would not be pleased if he or she rebuffed the employer's solicitation to reject union representation.³⁵¹

Accordingly, without a valid explanation provided to employees in a timely manner, surveillance of "employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer."³⁵²

In this case, the union engaged in objectionable conduct when it photographed employees as they were offered literature by union representatives. The union did not adequately explain its purpose for the photographing when it told a single employee that "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run,"³⁵³ as this explanation was held to be "ambiguous at best."³⁵⁴

347. 347 N.L.R.B. No. 56 (*Randell II*) (2006).

348. *Id.* at 1. This overruled the Board's prior decision in *Randell Warehouse of Arizona, Inc.* (*Randell I*), 328 N.L.R.B. 1034 (1999) (overruling Board precedent which had held that union photographing was objectionable and presumptively coercive and finding that photographing was not objectionable because it was not accompanied by other coercive conduct).

349. *Randell Warehouse of Ariz.*, 347 N.L.R.B. No. 56 at 1.

350. *Id.*

351. *Id.* at 4.

352. *Id.* at 1.

353. *Id.*

354. *Id.* at 8.

Therefore, as “photographing . . . is presumptively coercive,” the union could not establish a legitimate justification for its surveillance, which unlawfully interfered with employee free choice.³⁵⁵

D. Prohibition on Wearing Union Buttons

In *Starwood Hotels & Resorts Worldwide Inc.*,³⁵⁶ the Board held that the employer, a resort hotel, did not violate Section 8(a)(1) of the Act and was justified in prohibiting in-room food-delivery service employees from wearing union buttons in public areas.³⁵⁷ In coming to this conclusion, the Board gave great weight to the hotel’s marketing efforts to present a “‘Wonderland’ [image] where guests [could] fulfill their ‘fantasies and desires’ and get ‘whatever [they] want whenever [they] want it.’”³⁵⁸ To further enhance this sought-after character, the hotel referred “to its lobby as its ‘living room,’” and referred to its employees as “talent” or “cast members,” their supervisors as “talent coaches,” and the hotel experience itself as “wonderland.”³⁵⁹ The hotel commissioned uniforms for its employees that provided a “trendy, distinct, and chic look” for workers who had public contact,³⁶⁰ required employees to wear a small “‘W’ pin on the[ir] upper left chest” area, and prohibited all other uniform adornments.³⁶¹ Further, when interacting with guests, the employer directed all employees to introduce themselves by name and to make every interaction “Genuine, Authentic, Comfortable, Engaging, Conversational, with Personality, Fun.”³⁶² The hotel strived to “create ‘an emotional attachment’ for guests, to move from ‘never say no to let me work the magic,’ to look for opportunities to ‘grant wishes,’” and to make the “W” experience “[a] dream come true.”³⁶³

One day, server Sergio Gonzalez donned a button distributed by the union that was two inches square and read: “‘JUSTICE NOW! JUSTICE AHORA! H.E.R.E. LOCAL 30’ in blue or red letters on a yellow background.”³⁶⁴ During Gonzales’ meal break in a non-public area, his supervisor (or “talent coach”) directed him to remove the button.³⁶⁵ Arguing in favor of the legality of its action, the employer claimed that allowing employees to wear a union button was akin to allowing “graffiti on the Mona Lisa.”³⁶⁶ Chairman Battista and Member Schaumber refused to question the employer’s business plan and held that it

355. *Id.* at 10.

356. 348 N.L.R.B. No. 24 (2006).

357. *Id.* at 1.

358. *Id.*

359. *Id.* at 7.

360. *Id.* at 1.

361. *Id.*

362. *Id.*

363. *Id.* at 16.

364. *Id.* at 2.

365. *Id.*

366. *Id.* at 9.

demonstrated sufficient circumstances to justify the prohibition on the display of the button in public areas.³⁶⁷ Considered together, the hotel's investment in developing its brand and meticulous efforts to enforce that brand persuaded the Board majority that it was integral to the employer's corporate image.³⁶⁸ Thus, the employer could prohibit employees from wearing such buttons while in public areas of the hotel.³⁶⁹

E. Successorship

In *Planned Building Services, Inc.*,³⁷⁰ the Board clarified the standard to be applied when a successor employer allegedly refuses to hire its predecessor's employees to avoid an obligation to bargain with the union representing those employees. Planned Building Services, a New York City cleaning and maintenance contractor, received service contracts at several buildings which had SIEU-represented workforces.³⁷¹ The employer decided not to employ most of those employees and staffed the buildings with nonunion workers.³⁷²

On these facts, the Board unanimously held that the proper standard to apply in a successorship-avoidance case is the *Wright Line*³⁷³ test for unfair labor practice allegations involving employer motivation.³⁷⁴ To establish a *Wright Line* violation, the employer's actions must be "the result of its animus toward union or protected activity."³⁷⁵ If that showing is made, then the employer may avoid liability only by demonstrating "that it would have taken the same action even in the absence of the protected activity."³⁷⁶ Applying this *Wright Line* standard, the Board found that the employer violated Section 8(a)(3) of the Act by avoiding its obligation to the predecessor's employees.³⁷⁷ When addressing the proper

367. *Id.*

368. *Id.* at 2.

369. *Id.* Nevertheless, in *Starwood Hotels* a different Board majority (Members Liebman and Schaumber, with Chairman Battista dissenting) held that the employer violated the Act when it prohibited the employee from wearing his button in nonpublic areas of the workplace. *Id.* at 3. The hotel contended that it would be impractical to prevent the employee from wearing the button in public areas while allowing him to wear it in nonpublic areas. The Board, however, found that the employer provided no evidence speaking to this impracticability, as the employee would simply be required to remove the button from his or her uniform and was not asked to make any other alteration to the uniform. *Id.*

370. 347 N.L.R.B. No. 64 (2006).

371. *Id.* at 2.

372. *Id.*

373. 251 N.L.R.B. 1083 (1980).

374. *Planned Bldg. Servs.*, 347 N.L.R.B. No. 64 at 2.

375. *Id.* at 3.

376. *Id.* Furthermore, the Board held that its *FES*, 331 N.L.R.B. 9 (2000) standard for evaluating a discriminatory refusal-to-hire is not appropriate when addressing a successor's refusal-to-hire.

377. *Id.* at 5.

remedy in this type of case, the Board explained that the traditional make-whole remedy, which awards backpay and benefits, is based on the predecessor employer's "terms and conditions of employment."³⁷⁸ Significantly, however, the Board carved out an exception for successorship-avoidance cases, and held that the successor employer's remedial obligation may be altered on the presentation of evidence that it would not have agreed to the financial terms of the predecessor's collective bargaining agreement.³⁷⁹

CONCLUSION

Clearly, the Board's jurisprudence experienced substantial development during the survey period. Most significant were the Board's decisions in the *Oakwood* trilogy, which are sure to provide fertile ground for debate among labor law scholars and practitioners for the foreseeable future. As other hotly-contested cases are currently pending before the Board,³⁸⁰ the impact of changes in future years is much-anticipated.

378. *Id.* at 6.

379. *Id.* at 7.

380. *See, e.g.,* Dana Corp. & Metaldyne Corp., 341 N.L.R.B. No. 150 (2004) (indicating that it may not treat recognition pursuant to a neutrality agreement as the equivalent of a secret ballot election).

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

JEFF PAPA *

INTRODUCTION

The Indiana Rules of Evidence (“Rules”) have been in place only since 1994. Although many cases have been decided interpreting the Rules, many areas remain uncertain. This uncertainty applies both to interpretation of various aspects of the Rules, as well as their similarity to and differences from the Federal Rules of Evidence.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 2005, and September 30, 2006. The discussion topics are grouped in the same subject order as the Rules.

I. SCOPE OF THE RULES

A. *In General*

Rule 101(a) provides that the Rules are applicable to all Indiana court proceedings except where “otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court.”¹ Where the “rules do not cover a specific evidence issue, common or statutory law shall apply.”² This system of varying sources of interpretation and authority leave the Rules open to debate in many areas.

The wording of Rule 101(a), requiring the application of statutory or common law in areas not covered by the Rules, has been interpreted by the Indiana Supreme Court to mean that the Rules trump any conflicting statute.³

B. *Applicability in Probation Revocation Hearing*

In *Whatley v. State*,⁴ the State had successfully requested during a probation revocation hearing that the court take judicial notice of a probable cause affidavit.⁵ The information contained in the affidavit had convinced the court to revoke Whatley’s probation.⁶ On appeal, Whatley argued that the probable cause affidavit was inadmissible hearsay.⁷

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1. IND. R. EVID. 101(a).

2. *Id.*

3. See *Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997) (citing *Harrison v. State*, 644 N.E.2d 1243, 1251 n.14 (Ind. 1995)); *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996) (citing *Harrison*, 644 N.E.2d at 1251 n.14)).

4. 847 N.E.2d 1007 (Ind. Ct. App. 2006).

5. *Id.* at 1011.

6. *Id.* at 1009.

7. *Id.* at 1010.

While agreeing that the affidavit was hearsay, the court refused to overturn the revocation of Whatley's probation.⁸ In reaching its decision, the court noted that Rule 101(c)(2) provides that the Rules do not apply in probation proceedings,⁹ and that trial court judges are allowed to consider "any relevant evidence bearing some substantial indicia of reliability" during probation revocation hearings.¹⁰

C. Failure to Make Offer of Proof

In *Dylak v. State*,¹¹ Dylak appealed, in part, based on his contention that the court had erred when it sustained the State's objection to allow Dylak's expert witness to testify as to the cause of a crash.¹² Dylak had failed to make an offer of proof, and on appeal, he argued that his expert should have been given an opportunity to testify on the subject in question.¹³

The court held that Dylak had waived any appeal of this point by failing to make an offer of proof in accordance with Rule 103.¹⁴ The court further noted that the reason for requiring an offer of proof is that it allows the "trial and appellate courts to determine the admissibility of the testimony and the potential for prejudice if it is excluded."¹⁵

In *State v. Wilson*,¹⁶ the State appealed, in part, because the court of appeals had held that the State had waived its objection to the exclusion of the testimony of Wilson's wife by failing to make a proper offer of proof.¹⁷ The court of appeals had relied on the Indiana Supreme Court's decision in *Hilton v. State*.¹⁸

In *Hilton*, the court had held that "an offer of proof should indicate the facts sought to be proved and establish the 'competency, and relevancy of the offered.'"¹⁹ "*Hilton* went on to find the offer of proof . . . insufficient because

8. *Id.* at 1010-11.

9. *Id.* at 1010 (citing IND. R. EVID. 101(c)(2)).

10. *Id.* (citing *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1991)); but cf. *In re Z.H.*, 850 N.E.2d 933, 941 (Ind. Ct. App. 2006) (concluding that while the Rules explicitly do not apply to preliminary juvenile matters, the Rules must be applied to "the full evidentiary hearing given a juvenile facing a State petition to place the juvenile on the sex offender registry").

11. 850 N.E.2d 401 (Ind. Ct. App. 2006).

12. *Id.* at 407-08.

13. *Id.* at 408.

14. *Id.* (quoting IND. R. EVID. 103(a)(2)) (stating that error can not be predicated on a ruling admitting or excluding evidence unless a party's substantial rights are affected and, at trial, the "substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked").

15. *Id.* at 408; see, e.g., *Harmon v. State*, 849 N.E.2d 726, 729 (Ind. Ct. App. 2006) (allowing appeal of a ruling at trial where a proper offer of proof was made).

16. 836 N.E.2d 407 (Ind. 2005).

17. *Id.* at 408.

18. *Id.* at 409 (citing *Hilton v. State*, 648 N.E.2d 361 (Ind. 1995)).

19. *Id.* (quoting *Hilton*, 648 N.E.2d at 362).

it ‘lack[ed] specificity and fail[ed] to establish such material facts as when the conversation took place, where the conversation took place, and who was present at the time.’”²⁰ The *Hilton* court also held that an offer of proof must vouch for the testimony to be offered.²¹ The court reconsidered this position in *State v. Wilson*.²² The court stated that:

The language in *Hilton* that would require time and place and other details overstates the requirements for an adequate offer of proof. An offer of proof should show the facts sought to be proved, the relevance of that evidence, and the answer to any objection to exclusion of the evidence. Details that are immaterial to ultimate facts are not necessary. Where and when a conversation took place ordinarily are irrelevant to any issue before the court. To the extent *Hilton* suggests they are generally required it is disproved.²³

The court also disapproved of language from *Hilton* suggesting that offers of proof must vouch for the proffered testimony.²⁴ This requirement was altered to state that “[t]he attorney making an offer of proof must have a good faith and reasonable belief that the witness will testify as the attorney states, but the attorney is not a warrantor of the witness’s reliability.”²⁵

D. Completeness Doctrine

In *Sanders v. State*,²⁶ Sanders appealed his conviction for felony child molestation.²⁷ After being charged with the crime, Sanders had written an unsolicited letter of apology to the court.²⁸ At trial, the State had successfully redacted a reference in the letter to the victim having been a victim of prior molestation.²⁹ Sanders argued that the redaction violated the completeness doctrine and took his comments out of context while preventing his counsel from presenting a full reading of the evidence.³⁰

Rule 106 requires that where a “writing or recorded statement or part thereof

20. *Id.*

21. *Id.*

22. *Id.* at 410.

23. *Id.*

24. *Id.*

25. *Id.* *Wilson* also discussed at length purported changes to the spousal immunity law enacted as a part of the 1998 recodification of portions of the Indiana Code. *See id.* at 410-14. Because the recodification process is undertaken by the Legislature with the understanding that substantive changes are not being made, and because the prior spousal privilege law continued to exist, the 1998 changes were held to be ineffective. *See id.*

26. 840 N.E.2d 319 (Ind. 2006).

27. *Id.* at 322.

28. *Id.* at 320-21.

29. *Id.* at 321.

30. *Id.* at 322.

is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.”³¹ However, inclusion of the redacted portions would violate Rule 412,³² and the letter, even taken as a whole, contained admissions of guilt and apology.³³ Exclusion of the redacted portions would not have placed the letter in any more favorable context.³⁴

II. JUDICIAL NOTICE

*Lutz v. Erie Insurance Exchange*³⁵ involved a dispute as to fault in an automobile accident.³⁶ Lutz claimed that the trial court should have taken judicial notice both of the fact that the other party admitted the traffic light was red in her answer and that the light was actually red.³⁷ The trial court declined to take notice of either item.³⁸

The court held that under Rule 201, the fact that the light was allegedly red is not the type of fact appropriate for judicial notice because it is subject to reasonable dispute.³⁹ However, because the other party had admitted the light was red in her answer, it was judicially noticeable as a part of a pleading because parties should present their cases assuming that facts admitted by other parties require no proof.⁴⁰

III. RELEVANCE AND PROBATIVE VALUE VERSUS PREJUDICIAL

A. Relevance

In *Lee v. Hamilton*,⁴¹ an exhibit for impeachment purposes containing prior allegations of fault against another party was excluded at trial.⁴² Lee argued on appeal that this evidence was relevant and should have been admitted under Rule 401.⁴³ Although the evidence was relevant, Rule 403 also calls for the exclusion

31. IND. R. EVID. 106.

32. Rule 412 provides that in a “prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted.” IND. R. EVID. 412.

33. *Sanders*, 840 N.E.2d at 322-23.

34. *Id.* at 323.

35. 848 N.E.2d 675 (Ind. 2006).

36. *Id.* at 677.

37. *Id.* at 678.

38. *Id.* at 677-78.

39. *Id.* at 678. Rule 201 states that a judicially-noticed fact “must be one not subject to reasonable dispute” as it is either generally known or “capable of accurate and ready determination” in a manner that cannot be reasonably questioned. IND. R. EVID. 201(a).

40. *Lutz*, 848 N.E.2d at 678.

41. 841 N.E.2d 223 (Ind. Ct. App. 2006).

42. *Id.* at 227-28.

43. *Id.* at 227-29. Rule 401 states that relevant evidence is “evidence having any tendency

of such evidence if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”⁴⁴ The court held that the evidence had potential to confuse the issues or mislead the jury, which substantially outweighed its probative value, and was properly excluded by the trial court.⁴⁵

In *Smith v. Johnston*,⁴⁶ Smith was a doctor who negligently placed a catheter in Johnston, causing damage to a breast implant and possibly delaying Johnston’s cancer treatment while the damage was repaired.⁴⁷ Johnston’s estate made claims for both wrongful death as well as bodily injury.⁴⁸ The jury found for Johnston on the bodily injury claim and for the defendant on the wrongful death claim.⁴⁹ On appeal, Smith argued that an exhibit detailing medical expenses related to cancer treatment from the date of the negligent catheter placement until Johnston’s death was improperly admitted.⁵⁰

Smith argued that this evidence should not have been admitted because Johnston did not prove that these expenses were made necessary by Smith’s negligent action.⁵¹ The court pointed out that the law does not require that medical bills be shown to be reasonable and necessary before they are admissible, but only that they be reasonable and necessary to be recoverable and that the admission of evidence is first and foremost a question of relevancy.⁵² Under Rule 401, “[e]vidence is relevant if it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’”⁵³ Because the exhibit contained evidence of medical expenses incurred after Smith’s negligent actions, the evidence was relevant and admissible under both the wrongful death and the wrongful injury claims.⁵⁴

B. Probative Versus Prejudicial

Smith also argued that the evidence should have been excluded under Rule 403 because the expenses were for treatment of cancer, which was not caused by

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” IND. R. EVID. 401.

44. *Lee*, 841 N.E.2d at 229 (quoting IND. R. EVID. 403).

45. *Id.*

46. 854 N.E.2d 388 (Ind. Ct. App. 2006).

47. *Id.* at 389.

48. *Id.*

49. *Id.*

50. *Id.* at 390.

51. *Id.*

52. *Id.* (quoting *Chemco Transport, Inc. v. Conn*, 506 N.E.2d 1111, 1115 (Ind. Ct. App. 1987)).

53. *Id.* at 390-91 (quoting IND. R. EVID. 401).

54. *Id.* at 391.

Smith's negligent actions.⁵⁵ Smith believed that this evidence confused the jury, while Johnston argued that the delay in cancer treatment caused by the negligent catheter placement led to additional expense and eventually death.⁵⁶ However, because the issue of causation was unclear, the court held that the danger of confusion was not substantially outweighed by its probative value.⁵⁷

In *Ray v. State*,⁵⁸ Ray appealed his conviction for unlawful possession of a firearm by a serious violent felon ("SVP").⁵⁹ At trial, Ray had offered to stipulate that he had a prior conviction for a qualifying crime under the statute prohibiting firearm possession by SVPs.⁶⁰ However, the trial judge had insisted that the jury know exactly what the prior crime had been.⁶¹

On appeal, Ray argued that allowing the jury to know that he had a prior conviction for robbery, rather than simply informing them that he had a qualifying prior conviction, was unduly prejudicial.⁶² The court held that the danger of unfair prejudice substantially outweighed the probative value of this evidence and that the trial court had abused its discretion by allowing the evidence of the prior robbery conviction.⁶³ There was danger of unfair prejudice in admitting the specific conviction for robbery, while Ray had offered to stipulate that he had a qualifying prior conviction. Thus, the naming of the specific prior conviction added nothing but the possibility of unfair prejudice. However, the court found this error to be harmless.⁶⁴

C. Evidence of Other Crimes, Wrongs or Acts

In *Earlywine v. State*,⁶⁵ Earlywine appealed his conviction for intimidation.⁶⁶ At trial, various witnesses had been allowed to testify about their fear of

55. *Id.* Rule 403 states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." IND. R. EVID. 403.

56. *Smith*, 854 N.E.2d at 391-92.

57. *Id.* at 392; *see also* *Southtown Prop., Inc. v. City of Fort Wayne*, 840 N.E.2d 393, 403 (Ind. Ct. App. 2006).

58. 846 N.E.2d 1064 (Ind. Ct. App. 2006).

59. *Id.* at 1066.

60. *Id.*

61. *Id.* at 1067.

62. *Id.* at 1068.

63. *Id.* at 1069-70.

64. *Id.* Ray did not challenge the sufficiency of the evidence, he had testified to facts regarding robberies in Indiana and Kansas, and the term "Serious Violent Felon" had not been used at trial. *Id.*; *but see* *Gray v. State*, 841 N.E.2d 1210, 1220 (Ind. Ct. App. 2006) (holding that Gray's counsel should have requested bifurcation because the generic charge of SVF left the jury wondering as to what crime Gray had committed).

65. 847 N.E.2d 1011 (Ind. Ct. App. 2006).

66. *Id.* at 1012.

Earlywine.⁶⁷ Earlywine argued that admission of this evidence was improper under Rule 404(b),⁶⁸ which provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .⁶⁹

The court held that this evidence had been properly admitted.⁷⁰ Evidence about the fear of Earlywine did not refer to a prior crime, wrong, or act.⁷¹ In addition, the witness had testified that the fear was mental or emotional and that it did not stem from any physical altercation.⁷² This was further proof that the jury had not improperly considered evidence of any prior batteries Earlywine may have committed on the witness.⁷³

In *Samaniego-Hernandez v. State*,⁷⁴ Samaniego Hernandez (“Samaniego”) had conducted a drug buy with an undercover officer. Police officers later obtained a search warrant and found additional drugs in Samaniego’s residence. At trial, Samaniego argued that he had no knowledge of the drugs and that his involvement with the drug buy should have been excluded as evidence of a prior bad act under Rule 404(b).⁷⁵

The court found that such evidence may be admissible if the evidence is probative of the defendant’s motive and is inextricably bound up with the charged crime,⁷⁶ and that inadmissible evidence may become admissible where the defendant “opens the door” to questioning on that subject.⁷⁷ Samaniego put the evidence at issue by attempting to show he had no knowledge of the drugs, and therefore the evidence was relevant to show knowledge.⁷⁸

Although the evidence was found relevant, the court continued to consider whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under Rule 403.⁷⁹ The court found that the offered evidence of the prior drug buy was highly probative on the issue of Samaniego’s knowledge of the drugs, and had been properly admitted.⁸⁰

67. *Id.*

68. *Id.* at 1013.

69. *Id.* (quoting IND. R. EVID. 404(b)).

70. *Id.* at 1014.

71. *Id.*

72. *Id.*

73. *Id.* at 1013-14.

74. 839 N.E.2d 798 (Ind. Ct. App. 2005).

75. *Id.* at 802.

76. *Id.* (citing *Willingham v. State*, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003)).

77. *Id.* (quoting *Jackson v. State*, 728 N.E.2d 147, 152 (Ind. 2000)).

78. *Id.* at 803.

79. *Id.*

80. *Id.* at 803-04.

In *Ramsey v. State*,⁸¹ Ramsey had argued at trial that the two year delay between the alleged acts and the filing of charges had been due to the weak nature of the evidence against Ramsey. The State rebutted this charge by eliciting testimony from the arresting officer that the officer had been out of the county for much of that time working on another case and that this work led the police to look at Mr. Ramsey for possible involvement in a federal drug conspiracy.⁸²

Ramsey argued that this testimony was prohibited under Rule 404(b) as impermissible evidence of uncharged prior bad acts. The court held that the state's purpose was merely to rebut Ramsey's contention that the delay in bringing charges was due to weakness of the evidence.⁸³ The trial court had given an appropriate admonishment as to the purpose for which the jury could consider this testimony, and therefore there was no error.⁸⁴

In *Payne v. State*,⁸⁵ Payne appealed her convictions for felony murder and burglary. At trial, a portion of a letter written by Payne had been admitted which discussed "how easy a robbery or burglary target her then employer would be" and why such a target would be desirable.⁸⁶ Other than this letter, the record showed no evidence of any overt acts toward robbery or burglary, and there were no limiting instructions to the jury regarding consideration of the letter.⁸⁷

The State first argued that the letter excerpt was admissible because it provided evidence of a pertinent trait of Payne's character and was therefore allowed under Rule 404(a).⁸⁸ Rule 404(a) provides that "[e]vidence of a person's character or trait of character is not admissible" in order to show "action in conformity" with such trait, except for "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same."⁸⁹ Because Payne was not allowed to introduce evidence of her character at trial, this door was never opened and the State's argument under Rule 404(a) failed.⁹⁰

The State also argued that the letter excerpt was admissible under Rule 404(b) because it showed evidence of her intent to commit the crimes.⁹¹ However, Rule 404(b) is only available where the defendant has alleged a particular contrary intent, which may then be followed by an offering of evidence by the State of prior crimes, wrongs or acts to the extent relevant to prove the defendant's intent at the time of the offenses.⁹² Because Payne offered no

81. 853 N.E.2d 491 (Ind. Ct. App. 2006).

82. *Id.* at 499.

83. *Id.* at 500.

84. *Id.*

85. 854 N.E.2d 7 (Ind. Ct. App. 2006).

86. *Id.* at 18.

87. *Id.*

88. *Id.*

89. *Id.* at 18 (quoting IND. R. EVID. 404(a)).

90. *Id.*

91. *Id.*

92. *Id.* at 19 (citing *Wickizer v. State*, 626 N.E.2d 795 (Ind. 1993)).

particularized claim of contrary intent, the letter was inadmissible.⁹³ Because the State had relied heavily on the contents of the letter and the information contained in it had not been introduced otherwise, the court reversed the trial court's ruling regarding admissibility of the letter.⁹⁴

D. Accusations of Prior Sexual Misconduct

In *Candler v. State*,⁹⁵ Candler argued that the trial court had improperly excluded evidence that his victim had previously made false allegations of sexual misconduct against her stepfather. While Rule 412 prohibits the introduction of evidence of the sexual history of the victim and provides four exceptions to this prohibition, none of the exceptions applied in this case.⁹⁶ However, a common law exception to Rule 412 survived the adoption of the Rules in 1994.⁹⁷ This exception states that prior accusations of rape are admissible where the victim has admitted the prior accusation was false, or that the prior accusation is demonstrably false.⁹⁸ Because the victim had not admitted the falsity of the prior charge and it was not demonstrably false, Rule 412 properly excluded this evidence.⁹⁹

Candler also argued that the testimony of two witnesses should have been excluded as irrelevant.¹⁰⁰ These two witnesses testified that the victim had relayed incidents to them concerning abuse of the victim which had begun when the victim was five years old but not been reported until she was nearly eighteen. The court found that this evidence was marginally relevant and therefore admissible under Rule 401 because the fact that the victim told others may help account for the significant gap in time between the crimes and reporting them.¹⁰¹

In *Redding v. State*,¹⁰² Redding appealed his conviction for child molestation. The State had presented evidence at trial that the victim had physical injuries consistent with molestation. At trial, Redding offered to provide evidence under

93. *Id.* at 20. The court also found that the admissibility of the letter would fail under the mistake of fact or accident provisions of Rule 404(b). *Id.*

94. *Id.* at 21; *see also* *Wallace v. State*, 836 N.E.2d 985, 998 (Ind. Ct. App. 2005) (holding that a defendant who dresses and acts appropriately and politely at trial and denies the charges against him does not open the door to rebutting evidence by the prosecution that the defendant normally acts in a different manner; error found harmless).

95. 837 N.E.2d 1100 (Ind. Ct. App. 2005).

96. *Id.* at 1103 (citing IND. R. EVID. 412).

97. *Id.*

98. *Id.* (citing *Morrison v. State*, 824 N.E.2d 734, 739 (Ind. Ct. App. 2005)). The court also noted that while the legislature enacted a rape shield statute, the Rape Shield Rule controls where it differs from the statute.

99. *Id.*

100. *Id.* at 1104.

101. *Id.* at 1105.

102. 844 N.E.2d 1067 (Ind. Ct. App. 2006).

Rule 412(2) of a prior molestation of the victim by another person.¹⁰³ The trial court prohibited this evidence because it was satisfied that the victim was not confusing the two perpetrators.¹⁰⁴

The court found that because the evidence of physical injuries consistent with the crime had been admitted, but Redding had not been allowed to advance the theory that someone else had caused the damage, partial corroboration had occurred.¹⁰⁵ In partial corroboration, evidence of a sexual injury automatically and unfairly bolsters the witness's credibility that an assault occurred, and therefore that the accused committed the crime.¹⁰⁶ The court reversed and remanded as Redding had not been given the opportunity to rebut the inference that he had caused the injuries in question, including the ability to cross-examine the witness regarding the prior molestation.¹⁰⁷

IV. WITNESSES

A. *Evidence of Prior Conviction*

In *Whiteside v. State*,¹⁰⁸ Whiteside argued that the trial court had improperly allowed the State to introduce evidence that Whiteside's witness, Parker, had a prior conviction for auto theft. Rule 609(b) prohibits the admission of a prior conviction if more than ten years have passed since the conviction or date of release from confinement unless the court determines that the probative value of the conviction supported by facts and circumstances substantially outweigh any prejudicial effect.¹⁰⁹ Rule 609(b) also provides that a conviction more than ten years old is not admissible in any case unless the proponent gives advance written notice of the intent to use such evidence.¹¹⁰

Whiteside first contended that the prior conviction in question was older than the ten years allowed by Rule 609(b).¹¹¹ The parties agreed that the ten year period began to run on the date that the witness was released from prison: March 1, 1995.¹¹² The State argued that the date on which to consider whether ten years had passed was the date of the crime: January 22, 2005.¹¹³ Whiteside argued that the relevant date was either the date the trial began or the date on which Parker

103. *Id.* at 1068.

104. *Id.* Rule 412(2) provides that evidence of a victim or witness's past sexual conduct may be admitted if it is evidence that "shows that some person other than the defendant committed the act upon which the prosecution is founded." *Id.* at 1070 (citing IND. R. EVID. 412(2)).

105. *Id.*

106. *Id.* at 1070-71 (citing *Turney v. State*, 759 N.E.2d 671, 676 (Ind. Ct. App. 2001)).

107. *Id.* at 1071.

108. 853 N.E.2d 1021 (Ind. Ct. App. 2006).

109. *Id.* at 1025.

110. *Id.* at 1025-26.

111. *Id.* at 1026.

112. *Id.*

113. *Id.*

testified: August 24 or August 25, 2005.¹¹⁴ The court ultimately determined that the proper date on which to examine the ten year period is the date on which the witness testifies or on which the evidence is introduced.¹¹⁵ Therefore, Parker's testimony fell outside the ten year limitation.¹¹⁶

Having determined that the prior conviction fell outside the ten year period, the evidence may still be admissible under Rule 609(b) if the probative value supported by specific facts and circumstances substantially outweighs the prejudicial effect.¹¹⁷ Because Rule 609(b) presumes exclusion of such evidence unless the balancing test is met, the onus is on the party seeking to admit the evidence.¹¹⁸ The trial court had engaged in a balancing test and found that the testimony was not that of the accused, and that the witnesses' credibility was a central issue at trial. The court found that the trial court had engaged in a proper balancing and met this criteria of Rule 609(b).¹¹⁹

Finally, the court examined the contention that the State had failed to provide written notice that it intended to use this evidence.¹²⁰ The court found that the trial court had abused its discretion in admitting this evidence, but ultimately found this to be harmless error as it went to credibility of a witness, not the defendant himself.¹²¹

B. Juror Misconduct

In *Shanabarger v. State*,¹²² Shanabarger appealed in part based on the contention that an alternate juror had made statements that Shanabarger had desired to plead guilty to the charges at an earlier stage of the proceedings. Shanabarger argued that the failure of his counsel to immediately request a mistrial was ineffective assistance of counsel.¹²³ Although jurors may not typically impeach their own verdict, Rule 606(b)(2) provides that a juror may testify that "extraneous prejudicial information was improperly brought to the jury's attention."¹²⁴

Trial counsel for Shanabarger testified that they had not heard any discussion

114. *Id.*

115. *Id.* at 1028.

116. *Id.*

117. *Id.* at 1029.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1030.

122. 846 N.E.2d 702 (Ind. Ct. App. 2006).

123. *Id.* at 707-08; *see also* *Saunders v. State*, 848 N.E.2d 1117, 1123 (Ind. Ct. App. 2006) (holding that the trial court had properly excluded evidence of a witness' prior convictions for theft, conversion and forgery which were fourteen, sixteen, and eighteen years old where the trial court had admitted evidence of one crime that fell within the ten-year limitation and the additional convictions bore little relevance to the witness' testimony).

124. IND. R. EVID. 606(b)(2).

of a prior guilty plea and believed the court's admonishment of the witness to have related to the fact that the witness had been late that day.¹²⁵ The witness in question also testified that he had in fact responded to another juror by stating that he did not believe that Shanabarger had actually wanted to plead guilty at any point in the proceedings.¹²⁶ Therefore, Shanabarger failed to prove he was prejudiced by this information and the ineffective assistance of counsel claim was rejected.¹²⁷

C. *Attacking Witness' Credibility With Specific Uncharged Incidents*

In *Saunders*,¹²⁸ Saunders appealed her conviction in part because the trial court had refused to allow her to present evidence of a previous, uncharged act by a witness of using a false social security number. Rule 608(b) provides that for the purposes of attacking a witness' credibility, and other than evidence of conviction of a crime as allowed by Rule 609, "specific instances may not be inquired into or proven by extrinsic evidence."¹²⁹

Although Rule 608(b) on its face prohibits the proffered testimony, Saunders argued that this violated her Sixth Amendment right of confrontation.¹³⁰ Saunders had waived this objection at trial, but the court went on to say that her claim would fail in any case because the Indiana Supreme Court has only allowed this exception in the narrow circumstance of false accusations of rape.¹³¹

D. *Juror Questions*

In *Burks v. State*,¹³² Burks appealed his convictions for attempted murder. He claimed that the trial court should have granted a mistrial because a juror was allowed to ask a question related to a subject which had been excluded through a motion in limine.¹³³ Rule 614 allows jurors to ask questions of witnesses,¹³⁴ but Burks claimed the trial court allowed this question submitted under Rule 614 to

125. *Shanabarger*, 846 N.E.2d at 709.

126. *Id.*

127. *Id.*

128. *Saunders*, 848 N.E.2d at 1123.

129. *Id.* at 1122. Such evidence may be used in certain instances of cross-examination at the court's discretion. *Id.*

130. *Id.*

131. *Id.* (citing *State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999)); see also *Moore v. State*, 839 N.E.2d 178 (Ind. Ct. App. 2005) (rejecting appellant's claim of entitlement to review victim's entire confidential police informant file under Rule 613 for "any prior inconsistent statements" or criminal activity).

132. 838 N.E.2d 510 (Ind. Ct. App. 2005).

133. *Id.* at 516.

134. Rule 614(d) provides that a "juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties." IND. R. EVID. 614(d).

overrule the balancing process of Rules 403 and 404.¹³⁵ The jurors had asked if the witness knew why Burks would have wanted to shoot him. A grant of motion *in limine* had excluded the potential answer that Burks had asked the witness to join his gang and sell drugs.¹³⁶

The trial court examined Rule 404 and determined that the question posed by the jurors went to a highly relevant subject, identity and motive, and that the danger of unfair prejudice was outweighed by the potentially prejudicial effect.¹³⁷ The court noted that in addition to Rule 614, Jury Rule 20 had been adopted in January 2003. Jury Rule 20(a) provides that the “court shall instruct the jury . . . (7) that jurors may seek to ask questions of the witnesses by submission of questions in writing.”¹³⁸ The court also noted that if a trial court commits error by admitting evidence precluded by a motion *in limine*, the error is in the admission of the evidence at trial, not in the violation of the trial court’s own pretrial ruling.¹³⁹ The court found that the trial court had properly balanced the effect of the evidence under Rules 401, 403 and 404 and that the additional evidence had little effect on the outcome.¹⁴⁰

E. Separation of Witnesses

In *K.S. v. State*,¹⁴¹ K.S. appealed the determination that he had violated his probation from delinquency by attacking his sister. He appealed in part based on the fact that the trial court committed error by allowing his mother to remain in the room in spite of his request for separation of witnesses.¹⁴² Rule 615 provides that witnesses may be excluded at the request of a party “so that they cannot hear the testimony of or discuss testimony with other witnesses.”¹⁴³

The court noted that Indiana law “designates a child’s parent as a party to the proceedings and grants the parent all ‘rights of parties provided under the Indiana Rules of Trial Procedure.’”¹⁴⁴ Because his mother was his parent, she was not covered by the order granting separation of witnesses.¹⁴⁵

135. *Burks*, 838 N.E.2d at 516.

136. *Id.*

137. *Id.* at 516-17.

138. *Id.* at 518 (quoting IND. JURY R. 20(a)).

139. *Id.* at 519 (citing *Willingham v. State*, 794 N.E.2d 1110 (Ind. Ct. App. 2003)).

140. *Id.* at 520.

141. 849 N.E.2d 538 (Ind. 2006).

142. *Id.* at 542.

143. *Id.* (quoting IND. R. EVID. 615).

144. *Id.* (quoting IND. CODE § 31-37-10-7 (2004)).

145. *Id.* K.S. also argued that the court should have appointed a guardian ad litem as the mother was parent to both accused and victim. However, the court noted that Indiana Code section 31-32-3-6 leaves this decision to the discretion of the juvenile court. *Id.* at 543.

V. OPINIONS AND EXPERT TESTIMONY

In *McCutchan v. Blanck*,¹⁴⁶ McCutchan appealed the trial court's grant of summary judgment. McCutchan sued Blanck, the previous owner of his home, due to a defective septic system.¹⁴⁷ The trial court had excluded numerous items from evidence, and McCutchan challenged the grant of summary judgment on this basis.¹⁴⁸

The trial court had excluded portions of an affidavit filed by expert witness Mark Landrum.¹⁴⁹ The court noted that two criteria must be met in order for a witness to qualify as an expert.¹⁵⁰ The subject matter must be related to a "scientific field, business, or profession beyond the knowledge of an average layperson," and the witness must demonstrate "sufficient skill, knowledge or experience in that area so that the [witness'] opinion will aid the trier of fact."¹⁵¹

Specifically, Landrum's affidavit contained statements that a four-person family should pump a septic tank every three years, and that he had reviewed information from the defendants that they had only pumped the system three times in twenty-four years. In his opinion this was extremely neglectful.¹⁵² The court held that the first statement was a permissible statement based on Landrum's experience.¹⁵³ However, he did not identify the information relied upon to make the final two statements and provided no evidence he had talked to the defendants and therefore the second and third statements were improper and unsupported by the evidence.¹⁵⁴

Landrum's affidavit also contained statements that had the defendants properly maintained the system, it would still be in working order, and that at the time the defendants signed the disclosure statement the system was defective and defendants were experiencing problems with the system.¹⁵⁵ The court also found these statements impermissible as the source of the information was unidentified.

146. 846 N.E.2d 256 (Ind. Ct. App. 2006).

147. *Id.* at 259-60.

148. *Id.* at 260.

149. *Id.*

150. *Id.* at 261.

151. *Id.* (citing *Norfolk Southern Ry. Co. v. Estate of Wagers*, 833 N.E.2d 93, 101 (Ind. Ct. App. 2005)). Rule 702 provides that if

scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

IND. R. EVID. 702.

152. *McCutchan*, 846 N.E.2d at 261.

153. *Id.*

154. *Id.* at 261-62. In other words, no matter how smart you are, you can't make stuff up.

155. *Id.*

The court did note that Landrum was free to testify regarding the functioning of the septic tank and make expert opinions based on the experience of the plaintiffs, but that Landrum did not show how he determined the system was defective when owned by the defendants.¹⁵⁶

McCutchan had also offered the affidavit of Curtis Alverson at trial. Alverson had previously attempted to buy the property but had repudiated the agreement, allegedly over his suspicion of septic issues.¹⁵⁷ Alverson was not an expert in septic systems, and the court found that he was testifying as a lay witness.¹⁵⁸ For lay witnesses, Rule 701 states that the “witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”¹⁵⁹

Alverson’s affidavit contained the following statements of the following nature which had been excluded by the trial court: 1) by pumping the septic tank the day before a home inspection, the defendants rendered any test meaningless (improper lay witness testimony as Alverson is not a septic expert); 2) if the defendants told the truth about the pumping, they “incurred an unnecessary expense” (improper lay witness testimony as it is merely speculative); 3) Alverson did not believe the statements made by the defendants and based on the facts, he believed the defendants knew the septic system was defective (both improper because they are based on Alverson’s belief about knowledge held by the Blancks rather than being based on his rational perception); and 4) Alverson had to threaten suit over earnest money and that the defendants had threatened and intimidated Alverson (both irrelevant and impermissible character evidence under Rule 404(b)).¹⁶⁰

In *Gregory & Appel Insurance Agency v. Philadelphia Indemnity Insurance Co.*,¹⁶¹ the trial court’s ruling was remanded and the court of appeals considered what evidence might be admitted upon retrial. Elliot, an appraiser, had conducted a detailed site visit of the damaged school and made extensive calculations to perform an appraisal.¹⁶² Refka, a public adjuster, had not visited the site and had made broad conclusions with a range of possible values from \$100,000 to \$500,000.¹⁶³

While the court noted the gatekeeping function of Rule 702 which requires Refka’s testimony to rest on a reliable foundation and be relevant to the issue under consideration, the court saw no need to examine Rule 702.¹⁶⁴ It held that

156. *Id.* at 262.

157. *Id.*

158. *Id.*

159. *Id.* (citing IND. R. EVID. 701).

160. *Id.* at 262-63.

161. 835 N.E.2d 1053 (Ind. Ct. App. 2005).

162. *Id.* at 1061.

163. *Id.* at 1061-62.

164. *Id.*

Refka's testimony was at best cumulative of Elliot's testimony, and at worst an overly broad guess.¹⁶⁵ The court noted that the trial court would have been justified in excluding Refka's testimony under Rule 403 because it was merely cumulative and lacked a sufficient factual basis.¹⁶⁶

In *Bankhead v. Walker*,¹⁶⁷ discussed *infra*, a fire chief testified at a fire commission hearing as to a medical test report which showed that Bankhead had tested positive for marijuana use.¹⁶⁸ At the commission hearing, the chief was unable to interpret the drug results in his testimony.¹⁶⁹ Bankhead argued that "he was denied the opportunity to cross-examine the person responsible for performing the drug test and that the Commission should have introduced expert scientific testimony."¹⁷⁰

The court noted that Rule 702 allows for expert testimony if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence."¹⁷¹ The court then noted that the commission was unlikely to need assistance in interpreting the word "positive" along with the term "marijuana metabolite," and that the commission was allowed to operate with relaxed evidentiary standards.¹⁷² The court upheld the decision of the trial court that the evidence had been properly admitted at the commission hearing.¹⁷³

In *Troutwine Estates Development Co. v. Comsub Design & Engineering, Inc.*,¹⁷⁴ Troutwine had attempted to introduce expert testimony at trial showing that street drainage had been incorrectly designed by Comsub. The trial court had not allowed this testimony as it ruled that, although the proffered witness had an extensive background in civil engineering, he was not familiar with Lake County storm drain standards as they existed between the years of 1992-95.¹⁷⁵ Therefore, he was unfamiliar with the appropriate standard of care Comsub should have used.¹⁷⁶

Troutwine argued that the trial court relied on the modified locality rule which had been abolished by the Indiana Supreme Court.¹⁷⁷ In *Vergara v.*

165. *Id.* at 1062.

166. *Id.* at 1062. Rule 403 "provides that otherwise relevant evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.'" *Id.* (citing IND. R. EVID. 403).

167. 846 N.E.2d 1048 (Ind. Ct. App. 2006).

168. *Id.* at 1050.

169. *Id.* at 1055.

170. *Id.*

171. *Id.* (quoting IND. R. EVID. 702).

172. *Id.*

173. *Id.*

174. 854 N.E.2d 890 (Ind. Ct. App. 2006).

175. *Id.* at 901.

176. *Id.*

177. *Id.*

Doan,¹⁷⁸ the supreme court had abolished different standards of care based on locality in the medical malpractice realm, and replaced it with a test that is the same across location, but may consider location as only one factor in examining the appropriate standard of care.¹⁷⁹

However, the supreme court had limited this rule to the medical malpractice context.¹⁸⁰ In any case, the appropriate level of care would have included acting in accordance with the local regulations and rules of Lake County, with which the witness was unfamiliar. Without this knowledge, the witness would have been unable to provide the court with a sense of the appropriate level of care and whether that level had been breached.¹⁸¹

In *Mills v. Berrios*,¹⁸² an expert witness had provided an affidavit regarding medical issues. Appellant argued that the affidavit was legally insufficient and should have been stricken because neither party attached or designated “the medical records relied upon by the expert in formulating his opinion.”¹⁸³

The court first looked to the relevant portion of Rule 703, which provides that experts may testify “to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.”¹⁸⁴ The court held that “Rule 703 allows an expert to base an opinion on facts or data made known to the expert before a hearing, even if the facts or data are neither admitted nor admissible in evidence, if the information is of the type reasonably relied upon by experts in the field.”¹⁸⁵

In *Vaughn v. Daniels Co.*,¹⁸⁶ Daniels sought to strike portions of an expert witness affidavit because the expert had relied upon documents that were hearsay and not self-authenticating. The expert had reviewed design and construction plans as well as the health and safety policy of the facility in question.¹⁸⁷ The court held that the documents could reasonably be the basis for the expert’s opinions because they were of the type reasonable relied upon by experts in the field.¹⁸⁸

Daniels also challenged the affidavits on the basis that they contained inadmissible legal conclusions.¹⁸⁹ Rule 704 states that:

[t]estimony in the form of an opinion or inference otherwise admissible

178. 593 N.E.2d 185 (Ind. 1992).

179. *Troutwine Estates Dev. Co.*, 854 N.E.2d at 901-02 (citing *Vergara*, 593 N.E.2d at 186-87).

180. *Id.* at 902.

181. *Id.*

182. 851 N.E.2d 1066 (Ind. Ct. App. 2006).

183. *Id.* at 1071-72.

184. *Id.* at 1072 (quoting IND. R. EVID. 703).

185. *Id.*

186. 841 N.E.2d 1133 (Ind. 2006).

187. *Id.* at 1137.

188. *Id.*

189. *Id.*

is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. (b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.¹⁹⁰

The expert's opinions concerning engineering standards, procedures and design were based on his engineering knowledge and were permissible.¹⁹¹ His opinions on reasonable care and proximate cause embraced issues ultimately to be decided by the trier of fact and were therefore admissible.¹⁹² Daniels also argued that the testimony lacked foundation because the expert had simply reviewed documents and not visited the plant.¹⁹³ The court held that the affidavit was proper because "[h]ands-on experience, formal education, specialized training, study of textbooks, performing experiments and observation can provide the foundation for an expert's opinion,"¹⁹⁴ and although Trial Rule 56(E) requires "affidavits be made on personal knowledge, this does not mean" that the knowledge needs to be based just on first-hand experience.¹⁹⁵

In *Rose v. State*,¹⁹⁶ Rose appealed his conviction for child molestation. At trial, a witness had repeatedly stated that he was "very convinced" by the way the child victim described the alleged molestation incident.¹⁹⁷ Rose argued that this was improper under Rule 704(b) because the witness was in effect testifying as to whether another witness has testified truthfully.¹⁹⁸ The court noted that a special problem exists with child witnesses, but in this case the expert did not testify as to whether the child was prone to exaggeration or fantasy, but rather to her credibility and how convincing her testimony had been. The court found that this testimony was improper, and in the absence of conclusive physical evidence, had improperly bolstered the child's testimony. The court reversed and remanded for a new trial.¹⁹⁹

Mills also examined Rule 705, which provides that "the expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data The expert may in any event be required to disclose [those facts or data] on cross-examination."²⁰⁰ The expert had relied

190. IND. R. EVID. 704.

191. *Vaughn*, 841 N.E.2d at 1137.

192. *Id.*

193. *Id.* at 1138.

194. *Id.* (citing *Summit Bank v. Panos*, 570 N.E.2d 960, 965 (Ind. Ct. App. 1991)).

195. *Id.* (citing *Bunch v. Tiwari*, 711 N.E.2d 844, 849 (Ind. Ct. App. 1999)).

196. 846 N.E.2d 363 (Ind. Ct. App. 2006).

197. *Id.* at 355.

198. *Id.* at 366-67.

199. *Id.* at 367-69; *see also* *Dylak v. State*, 850 N.E.2d 401, 407-08 (Ind. Ct. App. 2006). (holding that Rule 704(b) expert witness testimony as to causation was properly excluded by the trial court due to failure to make an offer of proof).

200. *Mills v. Berrios*, 851 N.E.2d 1066, 1072 (Ind. Ct. App. 2006) (quoting IND. R. EVID.

upon the medical records of Methodist Hospital and OrthoIndy, and set forth his medical opinion on the matter based on these records. The court concluded that the affidavit was therefore not insufficient merely because the relevant medical records were not attached or designated.²⁰¹

VI. HEARSAY

A. Indirect Hearsay

In *Ikemire v. State*,²⁰² Ikemire appealed his conviction for dealing in a controlled substance. At trial, the court had sustained a hearsay objection made by the State, which Ikemire appealed.²⁰³ Officer Shatto had learned information from an inmate, and Ikemire attempted to have the officer testify about this information. Rather than simply ask the officer what the inmate had said, Ikemire asked the officer what he learned in that conversation.²⁰⁴ The State objected, claiming that this was simply a different route to impermissible hearsay, and the court agreed. While Ikemire did not directly ask for hearsay, this was simply an alternative way to elicit the same information, prohibited by Rule 801(c).²⁰⁵

B. Non-hearsay

In *Banks v. State*,²⁰⁶ Banks appealed the decision of the trial court to exclude Banks' testimony regarding what the arresting officer had told him during their encounter. Banks wished to offer the testimony to show that the officer was not telling the truth about what happened.²⁰⁷ The court determined that the testimony should have been allowed pursuant to Rule 801(d)(2), which states that a statement is not hearsay if it:

is offered against a party and is (A) the party's own statement, in either an individual or representative capacity; or . . . (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]²⁰⁸

705).

201. *Id.*

202. 852 N.E.2d 640 (Ind. Ct. App. 2006).

203. *Id.* at 644.

204. *Id.*

205. *Id.* Rule 801(c) provides that "[h]earsay" is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* (quoting IND. R. EVID. 801(c)). Rule 802 further provides that "hearsay is not admissible except as provided by law or by these rules." IND. R. EVID. 802.

206. 839 N.E.2d 794 (Ind. Ct. App. 2005).

207. *Id.* at 796.

208. *Id.* at 797 (citing IND. R. EVID. 801(d)(2)).

Because the officer's statements were made regarding a matter within the scope of his employment, they were not hearsay.²⁰⁹

C. Hearsay Exceptions

In *Reemer v. State*,²¹⁰ Reemer appealed his conviction for possession of a methamphetamine precursor. At trial, the State offered the labels found in a trash receptacle from the boxes of decongestant as evidence of the contents of the tablets found in Reemer's possession. Although the labels were hearsay because they were used to prove the truth of the matter asserted (that the tablets were a prohibited substance), the trial court admitted the labels under the hearsay exception of Rule 803(17).²¹¹ Rule 803(17) provides that the "following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . . Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."²¹²

The court first noted that the Indiana Rules of Evidence do not recognize the residual hearsay exception found in Federal Rule of Evidence 807 and its state equivalents.²¹³ The State had offered its label evidence under Rule 803(17)'s market report exception, which was a matter of first impression in Indiana. The court concluded that "labels of commercially marketed drugs are properly admitted into evidence under the exception provided by Evidence Rule 803(17) to prove the composition of the drug."²¹⁴

In *Forler v. State*,²¹⁵ Forler appealed her conviction for possession of methamphetamine precursors with intent to manufacture. During a traffic stop, police officers found several items in the trunk of her car, including a can of starting fluid and a Liquid Fire bottle.²¹⁶ On appeal, Forler argued that the labels on the bottle and the can were inadmissible hearsay because the labels were used to prove the truth of the matter asserted; that the can and bottle contained ether

209. *Id.*

210. 835 N.E.2d 1005 (Ind. 2005).

211. *Id.* at 1007.

212. IND. R. EVID. 803(17). "The [S]tate also offered the labels under [Rule] 902(5) which allows self-authentication for '[i]nscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin,'" but the court noted that this issue had not been raised at trial and self-authentication relieves the need for foundational testimony, but does not serve as a hearsay exception. *Reemer*, 835 N.E.2d at 1007 n.4 (quoting IND. R. EVID. 902(5)).

213. *Reemer*, 835 N.E.2d at 1007.

214. *Id.* at 1009. The court also held that the State had no duty to prove that pseudoephedrine hydrochloride is in fact pseudophedrine or a salt of pseudophedrine. It held that because pseudophedrine hydrochloride is an isomer of ephedrine, it falls within the statutory list of chemical reagents or precursors prohibited by Indiana Code. *Id.*

215. 846 N.E.2d 266 (Ind. Ct. App. 2006).

216. *Id.* at 267.

and sulfuric acid.²¹⁷

The State conceded that the labels were hearsay. Rule 803, however, contains several exceptions to the hearsay rule, and the *Forler* court examined these exceptions.²¹⁸ The court found that the Indiana Supreme Court had dealt with this issue regarding pharmaceuticals and found Rule 803(17) applicable in that because the tablets were in their original blister packs, it was sufficiently shown that the contents remained as the manufacturer packaged them.²¹⁹

Forler contended that the Indiana Supreme Court had only applied this logic to highly-regulated pharmaceuticals, but the court stated that it saw “no indication that our supreme court intended to foreclose any consideration of other types of product labels as possibly falling under Evidence Rule 803(17).”²²⁰ The court further noted that as both of these products were dangerous, “where a product label warns consumers that it contains dangerous ingredients, the general public reasonably relies upon the accuracy of such warnings.”²²¹

The court went on to state that this test has a second prong, which requires assurances that the contents of the container are the original contents.²²² In this case, the spray can had no indications of having been tampered with and reasonably appeared to contain the original content. The court found the Liquid Fire bottle to be more difficult because it had a screw off cap and the contents could have been replaced.²²³ The officer had testified that in his experience the liquid appeared to be Liquid Fire and that he had done a field acid test.²²⁴ The court held that a determination as to the sufficiency of the foundation of the officer’s testimony need not be examined because even if the admission of the Liquid Fire label was erroneous, the error was harmless.²²⁵

In *Rolland v. State*,²²⁶ Rolland appealed his convictions for theft and fraud upon a financial institution. At trial, the State had presented a bank fraud investigator who produced an account printout from Rolland’s account showing the fraudulent transactions.²²⁷ The State successfully argued at trial that while the report was hearsay, it was excluded from the hearsay rule by Rule 803(6). Rule 803(6) provides that a report is excluded from the hearsay rule if “made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report.”²²⁸

217. *Id.*

218. *Id.* at 268 (quoting IND. R. EVID. 803(17)).

219. *Id.* (citing *Reemer v. State*, 835 N.E.2d 1005 (Ind. 2005)).

220. *Id.*

221. *Id.* at 270.

222. *Id.*

223. *Id.* at 270-71.

224. *Id.* at 271.

225. *Id.* at 270-71.

226. 851 N.E.2d 1042 (Ind. Ct. App. 2006).

227. *Id.* at 1045.

228. *Id.* (quoting IND. R. EVID. 803(6)).

On appeal, Rolland argued that the requirements of 803(6) were not met “because [the report] was printed long after entry of the information into the” bank’s computer system, and therefore it is not reliable as an accurate representation of the information as entered into the account in 2004.²²⁹ However, the fraud investigator had testified that such record is kept in the regular course of the bank’s business, the information is entered by someone with personal knowledge of the transaction, and that any employee capable of making changes to the information was charged with inputting accurate information. Therefore, the trial court had not abused its discretion in admitting the report.²³⁰

In *Smith v. State*,²³¹ Smith appealed his conviction for stalking. In order to demonstrate that the defendant had violated a protective order, the State had admitted the victim’s cell phone records which listed sixty-nine prohibited phone calls from the defendant.²³² Smith argued that the phone records were not properly authenticated under Rules 803(6), 901 and 902(9).²³³

The court considered that the hearsay exception language of Rule 803(6) includes the qualification that the information be “as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.”²³⁴ Rule 901(a) requires that “authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”²³⁵ Finally, the court examined Rule 902(9), which allows for self-authentication of regular business records under Rule 803(6), provided that such record:

is accompanied by a written declaration by the custodian thereof or another qualified person that the record (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted activity, and (iii) was made by the regularly conducted activity as a regular practice.²³⁶

Two sets of cell phone records were submitted, one showing all incoming calls to the victim’s phone and one showing all incoming and outgoing calls.²³⁷ These records were used to demonstrate that Smith made the calls in question, and that the victim never attempted to call Smith. The affidavits submitted with the cell phone records stated that the signatory was acting on behalf of the custodian of records or was otherwise qualified as a result of her position, and

229. *Id.* at 1046.

230. *Id.*

231. 839 N.E.2d 780 (Ind. Ct. App. 2005).

232. *Id.* at 782-83.

233. *Id.* at 784-85.

234. *Id.* at 785 (quoting IND. R. EVID. 803(6)).

235. *Id.* (quoting IND. R. EVID. 901(a)).

236. IND. R. EVID. 902(9).

237. *Smith*, 839 N.E.2d at 785.

that she was in possession of a subpoena served on Verizon Wireless. The signatory also signed these affidavits as an employee of fidicianet, inc., and NeuStar, rather than Verizon.²³⁸

Smith argued that the State failed to lay a proper foundation for the affidavits because neither the signatory nor her employer's relationship with Verizon was sufficiently clear to indicate the trustworthiness of the documents.²³⁹ The court restated the rule that the phrase "other qualified witness" should be given its broadest possible interpretation.²⁴⁰ The signatory had verified, under penalty of perjury, that she was acting on behalf of the custodian of records or otherwise qualified. Smith had made no challenge as to the truth of the documents, and the self-authenticating documents had been properly admitted by the trial court.²⁴¹

In *Bankhead v. Walker*,²⁴² Bankhead was a fireman who was suspended after a random drug test identified evidence of marijuana use. At a hearing by the Gary Fire Civil Service Commission, Chief Gilliam introduced into evidence a set of documents including the results of Bankhead's drug test and chain of custody evidence. Bankhead appealed in part based on his contention that the documents were hearsay and the certification of the documents did not fully comply with Indiana Statute.²⁴³

While the Commission was allowed to use relaxed evidentiary standards in its employment proceedings, the trial court had found that the certification substantially complied with Rule 803(6) as records of a regularly conducted business activity.²⁴⁴ The court of appeals also found that because the Commission was allowed to use relaxed standards in introducing evidence, it was unnecessary for the Commission to fully comply with the relevant statutory provision.²⁴⁵

In *Gary v. McCrady*,²⁴⁶ McCrady had been allowed to admit evidence of an affidavit submitted by the Public Access Counselor. On appeal, Gary argued that because the portions of the affidavit in question relied on statements made by others and made improper conclusions of law and opinion, they were hearsay. McCrady argued that the affidavit was nevertheless admissible based on the hearsay exception of Rule 803(8) for public records and reports.²⁴⁷ The court

238. *Id.*

239. *Id.* at 786.

240. *Id.* (citing *Williams v. Hittle*, 629 N.E.2d 944, 949 (Ind. Ct. App. 1994)).

241. *Id.*

242. 846 N.E.2d 1048 (Ind. Ct. App. 2006).

243. *Id.* at 1050-51.

244. *Id.* at 1051.

245. *Id.* at 1054. Bankhead had been given notice and an opportunity to respond and therefore received sufficient due process. *Id.*

246. 851 N.E.2d 359 (Ind. Ct. App. 2006).

247. *Id.* at 363-64. Rule 803(8) exempts evidence from the hearsay rule (unless it lacks trustworthiness) where such evidence is comprised of "records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities." IND. R. EVID. 803(8).

determined that the trial court had erred by not striking the affidavit because Rule 803(8) states that findings from a special investigation of a particular complaint, case, or incident do not fall within this exception to the hearsay rule.²⁴⁸

In *Tate v. State*,²⁴⁹ Tate appealed his conviction for unlawful possession of a firearm by a serious violent felon. At issue on appeal were the State's Exhibit Nineteen, which contained a "probable cause affidavit, certified information, certified commitment record, certified abstract of judgment, and certified plea agreement," regarding a 1985 burglary charge against Tate, as well as State's Exhibit Twenty-one, which contained an "officer's arrest report concerning [Tate's 1987 arrest]" for probation violation.²⁵⁰

The court found that the Exhibit Twenty-one arrest report had been properly admitted under Rule 803(6) because it merely contained biographical information and the type of charge to be brought against the defendant.²⁵¹ It did not fall under the prohibition of Rule 803(8) because it did not contain any subjective assumptions, statements, interpretations or conclusions.²⁵²

The court agreed with Tate's claim that Exhibit Nineteen had been improperly admitted because it did fall under the prohibition of Rule 803(8).²⁵³ Rule 803(8) excludes from the exception:

investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency . . . ; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation . . . except when offered by an accused in a criminal case.²⁵⁴

The court held that the type of statements in a probable cause affidavit pose a risk of unreliability that the hearsay rule is designed to protect against.²⁵⁵

In *Lasater v. House*,²⁵⁶ evidence of undue influence comprised of hearsay statements reporting statements made by a deceased person were prohibited as hearsay by the trial court. The court of appeals had then held that the statements were relevant to the deceased person's state of mind as she executed her most

248. *Id.* at 364. Rule 803(8)(d) provides that "factual findings resulting from special investigation of a particular complaint, case or incident, except when offered by an accused in a criminal case." IND. R. EVID. 803(8)(d); *see also* *Legacy Healthcare, Inc. v. Barnes & Thornburg*, 837 N.E.2d 619 (Ind. Ct. App. 2005) (noting that Rule 803(8) does not accept investigative reports by or for an agency when offered by it in a case in which it is a party).

249. 835 N.E.2d 499 (Ind. Ct. App. 2005).

250. *Id.* at 508.

251. *Id.* at 509.

252. *Id.*

253. *Id.*

254. *Id.* at 508-09 (quoting IND. R. EVID. 803(8)).

255. *Id.*

256. 841 N.E.2d 553 (Ind. 2006).

recent will, and were therefore admissible under Rule 803(3).²⁵⁷ Rule 803(3) provides an exception to the hearsay rule for a statement of “the declarant’s then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it related to the execution, revocation, identification, or terms of declarant’s will.”²⁵⁸

The Indiana Supreme Court noted that Rule 803(3) is a state-of-mind exception, and that the issue presented was not whether the decedent’s statements were admissible to show her state of mind, but whether those statements could be introduced to show undue influence.²⁵⁹ The trial court had specifically excluded the evidence for use to demonstrate undue influence. The court noted that hearsay is not converted to “non-hearsay simply because it tangentially involves a state of mind.”²⁶⁰ The issue of admitting this evidence for other purposes can be determined at trial, but the only purpose at issue here was the potential use of the evidence to demonstrate undue influence. The court affirmed the judgment of the trial court.²⁶¹

In *Frye v. State*,²⁶² Frye appealed numerous convictions. After giving a police officer relevant information leading to the arrest, Frye’s girlfriend had refused to testify to this information at trial. The officer then testified as to what the girlfriend had told him. The trial court had admitted this evidence under Rule 803(2), which excludes evidence from the hearsay rule a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”²⁶³

The court pointed out that whether or not a statement constitutes an excited utterance is a factual issue subject to a clearly erroneous standard of review, similar to an abuse of discretion standard.²⁶⁴ The court noted that on June 19, 2006 the United States Supreme Court issued an opinion on *Hammon*, which included the following quotation:

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing

257. *Id.* at 554-55.

258. *Id.* at 556 (quoting IND. R. EVID. 803(3)).

259. *Id.*

260. *Id.*

261. *Id.*

262. 850 N.E.2d 951 (Ind. Ct. App. 2006).

263. *Id.* at 954-55 (quoting IND. R. EVID. 803(2)).

264. *Id.* at 955 (citing *Hammon v. State*, 829 N.E.2d 444, 449 (Ind. 2005)).

emergency.²⁶⁵

The Indiana Court of Appeals found that the girlfriend's statements fell within the nontestimonial definition set forth by the United States Supreme Court in *Hammon*. Because the testifying officer testified that a startling event occurred when an armed Frye entered a residence, and the original declarant was crying, hysterical, and her statements related to the event which was still occurring or had immediately occurred. Therefore, her statements had been made while under stress and were admissible under Rule 803(2).²⁶⁶

D. Unavailable Witnesses

In *Payne*,²⁶⁷ Payne argued that the trial court erred by admitting a videotape of Carter, one of the perpetrators, walking through the crime scene with police and vividly describing the murders. At trial, Carter had refused to testify even though he was offered immunity and ordered to testify by the court.²⁶⁸

While Rule 804(b) provides that certain out of court statements against interest are exempt from the hearsay rule where the declarant is unavailable to testify at trial, Rule 804(b)(3) also provides that a "statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception."²⁶⁹ While Carter also adds in the video that entry to the home was made via a second-floor window, this information had already been admitted into evidence.²⁷⁰ Carter did not discuss Payne in the video, and the court found that the only purpose of admitting the video was to show that the crime had been committed as Payne suggested and to show the horrible nature of the crimes in order to attribute them to Payne. The court determined that this evidence was not harmless and reversed and remanded the case for a new trial.²⁷¹

E. Confrontation Clause

In *Wallace v. State*,²⁷² the victim had identified Wallace as his attacker at the scene of the crime, in the ambulance and at the hospital. Wallace argued that while the statement at the scene was admissible as an excited utterance, the statements made in the ambulance and at the hospital were inadmissible hearsay.²⁷³ The court found that the statements made in the ambulance and at the

265. *Hammon v. Indiana*, 126 S. Ct. 2266, 2273 (2006).

266. *Frye*, 850 N.E.2d at 955.

267. 854 N.E.2d 7 (Ind. Ct. App. 2006).

268. *Id.* at 22.

269. *Id.* (quoting IND. R. EVID. 804(b)(3)).

270. *Id.*

271. *Payne*, 854 N.E.2d at 23.

272. 836 N.E.2d 985 (Ind. Ct. App. 2005).

273. *Id.* at 990.

hospital were admissible as either excited utterances or as dying declarations.²⁷⁴

Evidence is excluded from the hearsay rule where “the statement relates ‘to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition.’”²⁷⁵ Hearsay is also excepted and admissible where the statement is made while the declarant is “believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.”²⁷⁶

Wallace further cited *Crawford v. Washington*,²⁷⁷ for its proposition that the victim’s statements violated his Sixth Amendment right to confront the witnesses against him.²⁷⁸ The Crawford Court had determined that the Confrontation Clause of the Sixth Amendment focuses on statements which are testimonial in nature, including those made for the purpose of establishing or proving a fact and those made to police officers during an investigation. The Crawford Court had noted that an exception from the Confrontation Clause may exist for dying declarations, but declined to decide this issue in *Crawford*.²⁷⁹

The court examined the *Crawford* decision, subsequent cases in other states, and the *Hammon*²⁸⁰ case in Indiana for instruction. The court rejected Wallace’s argument that acceptance of the dying declarations violated his rights under the Confrontation Clause and denied him his right to cross-examine the witnesses against him. The court specifically held that the *Crawford* decision “neither explicitly, nor impliedly, signaled that the dying declaration exception to hearsay ran afoul of an accused right of confrontation under the Sixth Amendment.”²⁸¹

CONCLUSION

The Rules have now been in place for well over a decade. While many issues have been addressed since the inception of the Rules, cases continue to add interpretation to the plain language of the Rules.

This process is likely to continue for years to come as practitioners and courts continue to discuss interpretation of existing decisions, the interplay between the Rules and the Federal Rules of Evidence, as well as the interpretation of similar rules in other jurisdictions. Also ongoing will be the effect of the emergence of new scientific technologies and business methods to which the Rules will continue to adapt.

274. *Id.* at 991-92.

275. *Id.* at 991 (quoting IND. R. EVID. 803(2)).

276. *Id.* (quoting IND. R. EVID. 804(b)(2)).

277. 541 U.S. 36 (2004).

278. *Wallace*, 836 N.E.2d at 991-92. The Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” *Id.* at 992 (quoting U.S. CONST. amend. VI).

279. *Id.* at 995-96.

280. *Hammon v. State*, 829 N.E.2d 444, 452 (Ind. 2005).

281. 836 N.E.2d at 996 (citing *Crawford*, 541 U.S. at 1379 n.6).

RECENT DEVELOPMENTS: INDIANA FAMILY LAW

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INTRODUCTION

During the survey period, at least fifty Indiana appellate decisions were published involving the broad topic known as Family Law.¹ This Article is primarily limited to a review of Indiana Appellate Court decisions during the survey period which advance, clarify, or raise further questions regarding the State's body of family law, particularly commonly recognized subjects including dissolution of marriage, paternity, child custody, support and adoption. A significant piece of legislation regarding parental relocation in child custody matters was enacted during the survey period and will also be discussed.

I. DISSOLUTION OF MARRIAGE

The following discussion considers some noteworthy cases involving the topics of property distribution, spousal maintenance, marital agreements and other matters in the context of dissolution of marriage.

A. *Property Distribution*

1. *Marital Property Issues*.—The first of the three primary questions involved in marital asset distribution concerns the definition of marital property.

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1. Ten articles of Title 31 of the Indiana Code are specifically titled family law. IND. CODE §§ 31-11 to -20 (2004). These articles cover marriage, domestic relations courts, the parent-child relationship, establishment of paternity, dissolution of marriage and legal separation, support of children and other dependents, custody and visitation rights, the Uniform Interstate Family Support Act, adoption and human reproduction. Title 31 also contains an article of general provisions as well as an article consisting of 149 sections of definitions pertaining to both family and juvenile law. An additional eleven articles of Title 31 are specifically referred to as "juvenile law." *See* IND. CODE § 31-9-2-72 (2004) ("Juvenile law" refers to [Indiana Code section] 31-30 to 31-40.").

Also, every legal proceeding in Indiana between parents involving child support or visitation with their children is governed by the Indiana Supreme Court's Child Support Rules and Guidelines and Parenting Time Guidelines. Throughout an additional fifteen other titles of the Indiana Code are provisions governing criminal offenses against children and the family, children's protection services, marriage and family therapists, and trust and fiduciaries. Federal legislation involving taxation, bankruptcy and retirement benefits can be a consideration in virtually any property settlement. Other federal legislation impacts Native American adoptions, parental kidnapping and state enforcement of child support obligations.

The other two questions involve the valuation of the property and how it is to be distributed. Indiana courts have referred to asset distribution as a two-step process, involving a determination of the marital estate and its division.² However, the legal process of marital asset distribution is more involved than this may indicate. Determining marital property sometimes involves a determination of whether something is in fact property and, if so, whether it is a marital asset. Many cases involving valuation of assets attest to the significance of that question.

The marital property and valuation questions necessarily affect the final question—distribution.³ “Indiana subscribes to the ‘one pot’ theory of marital possessions.”⁴ This “one pot” theory has been defined as meaning that the marital estate includes all the property of the parties; whether owned by either spouse prior to marriage, acquired by either spouse in his/her right after the marriage and prior to final separation of the parties, or acquired by their joint efforts.⁵ Thus, property owned by either spouse before the marriage is included in the marital estate and subject to division and distribution.⁶ The “one pot” theory has been held to specifically prohibit the exclusion of any asset from the marital estate⁷

In other words, the law requires that all property owned by the parties before separation is to be considered part of the marital estate, and, with certain limited exceptions, this “one pot” theory specifically prohibits the exclusion of any asset from the scope of the trial court’s power to divide and award in a dissolution of marriage action.⁸ Under the “one pot” theory only property acquired by a spouse after the final separation date is excluded from the marital estate.⁹

With the above in mind, several cases during the survey period addressed the issue of whether property was includable in the marital estate.

a. Social Security Disability Benefits.—In *Severs v. Severs*,¹⁰ the Indiana Supreme Court addressed whether Social Security Disability Income is a marital asset subject to equitable distribution. In *Severs*, the Indiana Court of Appeals

2. *Gard v. Gard*, 825 N.E.2d 907, 911 (Ind. Ct. App. 2005) (citing *Thompson v. Thompson*, 811 N.E.2d 888, 912-13 (Ind. Ct. App. 2004)); see generally Robert J. Levy, *Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147 (1989).

3. See generally Levy, *supra* note 2.

4. *Perkins v. Harding*, 836 N.E.2d 295, 299 (Ind. Ct. App. 2005) (internal citations omitted).

5. *Neffle v. Neffle*, 483 N.E.2d 767, 769 (Ind. Ct. App. 1985) (citing IND. CODE § 31-15-7-4(a) (2004)).

6. *Fobar v. Vonderahe*, 771 N.E.2d 57, 58 (Ind. 2002).

7. *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004). For a discussion of *Thompson*, see Michael G. Ruppert & Joseph W. Ruppert, *Recent Developments: Indiana Family Law*, 38 IND. L. REV. 1085, 1089 (2005).

8. IND. CODE § 31-15-7-4(a) (2004); *Maxwell v. Maxwell*, 850 N.E.2d 969, 973 (Ind. Ct. App. 2006) (quoting IND. CODE § 31-15-7-4(a) (2004)).

9. *Maxwell*, 850 N.E.2d at 973.

10. 837 N.E.2d 498 (Ind. 2005).

had reversed¹¹ the trial court's determination that Husband's Social Security Disability payments were marital property.¹² The trial court had awarded Wife forty percent of Husband's future Social Security Disability payments.¹³ In granting transfer, the supreme court agreed with the decision of the court of appeals and reversed the trial court's order.¹⁴

Prior to *Severs*, the Indiana appellate courts had addressed other issues of inclusion in the marital pot such as Worker's Compensation,¹⁵ disability insurance under an employer sponsored policy that was purchased with marital assets¹⁶ and disability income benefits where no marital assets were used to contribute to the purchase of the benefits.¹⁷ However, no case in Indiana had specifically addressed inclusion of Social Security Disability benefits in the marital estate until the court of appeals decided *Severs*. In Indiana, the presumption is that all "assets acquired before final separation by either party are property subject to equal division."¹⁸ Property is defined as all the assets of either party or both parties, including:

- (1) a present right to withdraw pension or retirement benefits;
- (2) the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested (as defined in section 411 of the Internal Revenue Code) but that are payable after the dissolution of marriage; and
- (3) the right to receive the disposable retired or retainer pay "as defined in 10 U.S.C. 1408(a)" acquired during a marriage that is or may be payable after the dissolution of marriage.¹⁹

While "future earnings" are not considered part of the marital estate for purposes of property division a "future income stream":

maybe a marital asset to the extent that either marital assets were used to acquire the future income or the income is future compensation for past services, as opposed to replacement for lost earning capacity due to disability. But if both factors are absent a disability income stream is not

11. *Severs v. Severs*, 813 N.E.2d 812, 813 (Ind. Ct. App. 2004).

12. For a discussion of the court of appeals decision in *Severs*, see Ruppert & Ruppert, *supra* note 7, at 1087.

13. *Severs*, 837 N.E.2d at 499.

14. *Id.*

15. *Leisure v. Leisure*, 605 N.E.2d 755, 760 (Ind. 1993).

16. *Gnerlich v. Gnerlich*, 538 N.E.2d 285 (Ind. Ct. App. 1989).

17. *Antonacopulos v. Antonacopulos*, 753 N.E.2d 759, 761 (Ind. Ct. App. 2001); *Jendreas v. Jendreas*, 664 N.E.2d 367, 371 (Ind. Ct. App. 1996).

18. IND. CODE § 31-15-7-5 (2004); *Severs*, 837 N.E.2d at 499. As the court stated, "[t]he party who seeks to rebut the presumption . . . bears the burden of demonstrating that the statutory presumption should not apply." *Severs*, 837 N.E.2d at 499 (quoting *Beckley v. Beckley*, 822 N.E.2d 158, 162-63 (Ind. 2005)).

19. IND. CODE § 31-9-2-98(b) (2004).

a marital asset. . . .²⁰

Thus, the supreme court had determined that Worker's Compensation benefits intended to compensate for loss of future earnings were not marital property²¹ nor were employer or union provided disability benefits intended to compensate for loss of future earning which required no employee contribution and thus no depletion of the marital estate.²² However, Social Security Disability benefits are funded by a totally involuntary payroll tax some of which is paid by the employee.²³ Prior to *Severs* the court of appeals decided *Lawson v. Hayden*²⁴ in which the court had included a part of Husband's railroad retirement annuity in the marital estate because payroll taxes were used during the marriage to fund the annuity.²⁵ The court of appeals in *Severs* disagreed with the determination in *Lawson*—that payroll taxes constituted the use of marital assets²⁶—thus inviting the supreme court's grant of transfer and its decision in this case.²⁷

In its opinion, the supreme court noted that the court of appeals had correctly looked to federal authority to determine the nature of Social Security Disability benefits and their relation to payroll taxes.²⁸ Social Security disability benefits, because they are funded by an involuntary tax do not represent a depletion of the marital estate or property that is includable in the marital pot.²⁹

In dicta, the supreme court, in what amounted to an announcement of its position on the inclusion of Social Security benefits of any kind in the marital estate, stated that "any assignment or division of Social Security Benefits to satisfy a marital property settlement under Indiana law is barred by 42 U.S.C. 407."³⁰

b. Worker's compensation insurance benefits.—As noted earlier, the inclusion of worker's compensation benefits in the marital estate was addressed

20. *Severs*, 837 N.E.2d at 500.

21. *Leisure v. Leisure*, 605 N.E.2d 755, 759 (Ind. 1993).

22. *Antonacopulos*, 753 N.E.2d at 761-62 (employer provided disability benefits with no employee contribution); *Jendreas*, 664 N.E.2d at 371 (union pension disability benefits with no employee contribution).

23. *Severs*, 813 N.E.2d at 814 (Social Security deduction amounts to taxes imposed on all covered employees by the federal government and is wholly involuntary).

24. 786 N.E.2d 756 (Ind. Ct. App. 2003).

25. *Id.* at 762-63.

26. *Severs*, 813 N.E.2d at 814-15.

27. *Severs*, 837 N.E.2d at 501.

28. *Id.* at 500 (citing *Flemming v. Nestor*, 363 U.S. 603, 610 (1960)) (stating the interest of an employee covered by Social Security is a non-contractual interest and cannot be compared to that of an annuity whose rights are based on his contractual premium payment).

29. *Id.*

30. *Id.* at 501 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) ("This provision of federal law prevents state courts from assigning of social security benefits in a property division judgment.")).

by the supreme court in *Leisure v. Leisure*.³¹ Generally speaking, worker's compensation benefits received after the date of separation are not includable in the marital estate.³² However, worker's compensation benefits received during the marriage are included in the marital estate if those benefits were to replace earnings prior to the date of separation.³³

During the survey period the court of appeals did have the occasion to address the issue of whether certain worker's compensation benefits received during the marriage were to be included in the marital estate.

In the case of *Shannon v. Shannon*,³⁴ Husband "received a lump sum worker's compensation payment in the amount of \$48,000."³⁵ Subsequently, "Wife filed a petition for dissolution of marriage."³⁶ To equalize the estate, the court awarded wife \$10,000 of Husband's worker's compensation award. Husband appealed.³⁷ In affirming the trial court, the court of appeals restated the holdings of *Leisure* that worker's compensation benefits received during the marriage which represent lost income for a period prior to the date of separation were subject to inclusion in the marital estate, but the benefits for loss of future earnings were not.³⁸ In *Shannon*, the court reasoned that because Husband was injured in October 2000 and the date of separation occurred in January 2003, the lump sum award would include part of his lost income during the marriage in addition to loss of future income.³⁹ "Husband did not present any evidence regarding how much of the \$48,000 award" was apportioned to lost income prior to the date of separation and how much represented loss of future earnings.⁴⁰ Because this evidence was not presented, Husband was unable to "overcome the strong presumption that the trial court's disposition of marital property [was] correct."⁴¹

In the future, it would seem that a party seeking to exclude part of a lump sum Worker's Compensation settlement from the marital estate would need to present evidence of the portion of the lump sum allotted to past earnings and the portion allotted to future loss of earning capacity.

c. Inclusion of assets acquired after the Date of Separation.—The case of *Deckard v. Deckard*⁴² involved a question of whether money that Husband had withdrawn from a joint line of credit subsequent to the date of separation should be included in the marital estate. After Wife had filed the petition for dissolution

31. 605 N.E.2d 755 (Ind. 1993).

32. *Id.* at 759.

33. *Id.*

34. 847 N.E.2d 203 (Ind. Ct. App. 2006).

35. *Id.* at 204.

36. *Id.*

37. *Id.* at 205.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 206.

42. 841 N.E.2d 194 (Ind. Ct. App. 2006).

of marriage and before any preliminary hearing could be held, Husband withdrew \$4750 “from the parties’ joint line of credit to purchase a car.”⁴³ The trial court then included that amount in Husband’s assets.⁴⁴ Husband appealed arguing that the trial court had abused its discretion in awarding him the amount that he had withdrawn from the parties’ line of credit.⁴⁵ Pursuant to Indiana Code sections 31-15-7-4 and 31-9-2-6, the marital estate closes when the petition for dissolution is filed.⁴⁶ Husband withdrew the money from the line of credit and purchased the car subsequent to the date that Wife filed the dissolution petition but prior to the entry of any preliminary order.⁴⁷ Therefore, the asset was acquired after the marital estate had closed. As such, it was an abuse of the trial court’s discretion to include it in the marital estate.⁴⁸

d. Antenuptial agreements.—Of course, one way that an individual can make certain that property brought into the marriage will be “separate property” is through a valid “prenuptial” or “antenuptial agreement.”⁴⁹ “Antenuptial agreements” have been defined in Indiana as “legal contracts by which parties entering into a marriage attempt to settle their respective interests in the property of the other during the course of the marriage and upon its termination.”⁵¹

The court’s in Indiana have held that antenuptial agreements are construed according to the principles applicable to the construction of contracts.⁵² The intent of the parties as expressed in the language of the antenuptial agreement is the court’s starting point in interpreting the antenuptial agreement.⁵³

In *McCord v. McCord*⁵⁴ the parties entered into an antenuptial agreement whereby Husband sought to keep as his separate property his retirement savings plan, whole life insurance policy, and the increase in value that said items might experience between the date of the antenuptial agreement and, in the event of divorce, the date of the parties’ separation. The parties did in fact separate, and

43. *Id.* at 201.

44. *Id.*

45. *Id.* It should be noted that the parties did not have the corresponding liability for this line of credit withdrawal because both parties had agreed to file for Chapter 7 Bankruptcy. As the court had stated earlier: “[T]he trial court may not divide assets which do not exist just as it may not divide liabilities which do not exist.” *Id.* (quoting *In re Marriage of Lay*, 512 N.E.2d 1120, 1123-24 (Ind. Ct. App. 1987)).

46. *Id.*

47. *Id.*

48. *Id.*

49. *McCord v. McCord*, 852 N.E.2d 35, 42 (Ind. Ct. App. 2006).

51. *Magee v. Garry-Magee*, 833 N.E.2d 1083, 1087 (Ind. Ct. App. 2005). For a discussion of *Magee* specifically and antenuptial agreements in general, see Joseph W. Ruppert & Michael G. Ruppert, *Recent Developments: Indiana Family Law*, 39 IND. L. REV. 995, 999 (2006).

52. See generally *McCord*, 852 N.E.2d at 35; *Magee*, 833 N.E.2d at 1083.

53. *Schmidt v. Schmidt*, 812 N.E.2d 1074, 1080 (Ind. Ct. App. 2004). For review of *Schmidt* specifically and the interpretation of the language of the contract in general, see Ruppert & Ruppert, *supra* note 7, at 1088-89.

54. *McCord*, 852 N.E.2d at 35.

the trial court dissolved the marriage and divided the marital property. In doing so the trial court failed to set over the appreciated values of Husband's retirement savings plan and whole life insurance policy to him in accordance with the antenuptial agreement.⁵⁵ Husband appealed, contending that the failure to set these appreciated values over to him was error.⁵⁶ The court of appeals agreed. Relying upon *Magee* and *Schmidt*, the court analyzed the parties' antenuptial agreement. The court found that the antenuptial agreement had clearly intended that Husband's retirement plan, life insurance, and any appreciation in value were to be and remain his separate property.⁵⁷ The court remanded to the trial court with instructions to enter a new property division.⁵⁸

2. *Property Valuation Issues*.—It is a well-established rule of law in Indiana that a trial court may select a valuation date for marital property at “any time between the date a petition for dissolution is filed and the date a decree of dissolution is entered.”⁵⁹ A continuing problem occurs when the parties' settlement agreement purports to divide the proceeds of a pension or retirement account pursuant to a qualified domestic relations order (“QDRO”).⁶⁰ There is often a delay between the date of the dissolution decree and the processing of the QDRO by the financial institution.⁶¹ During this gap the retirement plan can, for many reasons, increase or decrease in value. So the question becomes: how is the gain or loss that occurs after the valuation date but before the QDRO becomes effective to be treated? This was the issue in *Shorter v. Shorter*.⁶² In *Shorter*, Husband and Wife agreed that Wife would be awarded one-half of the value of Husband's 401(k) as of the date of approval of the settlement agreement. As of the date the settlement agreement was approved by the court the value of Wife's share was approximately \$80,000.⁶³ Due to delays beyond the control of either party, by the time the QDRO had been approved and submitted to the financial institution, Wife's share had increased in value in excess of \$10,000.⁶⁴

55. *Id.* at 42.

56. *Id.*

57. *Id.* at 43.

58. *Id.*

59. *Magee v. Garry-Magee*, 833 N.E.2d 1083, 1087 (Ind. Ct. App. 2005) (citing *Reese v. Reese*, 671 N.E.2d 187, 191 (Ind. Ct. App. 1996)). The date of the filing for dissolution of marriage is the statutory “final separation date.” See IND. CODE § 31-9-2-46 (2004).

60. When dissolving a marriage in Indiana, the parties are free to draft their own settlement agreement which is contractual in nature and becomes binding on the parties when the court merges and incorporates the agreement into the divorce decree. *Shorter v. Shorter*, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006). These agreements are construed according to rules applicable to the construction of contracts, which means that “unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning.” *Id.*

61. See generally *Shorter*, 851 N.E.2d at 378; *Beike v. Beike*, 805 N.E.2d 1265 (Ind. Ct. App. 2004); *Niccum v. Niccum*, 734 N.E.2d 637 (Ind. Ct. App. 2000).

62. 851 N.E.2d 378 (Ind. Ct. App. 2006).

63. *Id.* at 380.

64. *Id.* at 382.

Husband sought clarification from the trial court regarding this increase in value. The trial court determined that the ex-wife was not entitled to the increase that had accrued after the valuation date but before the QDRO creating her account became effective.⁶⁵ Wife appealed. In reversing the trial court, the court of appeals discussed the prior decisions of *Niccum v. Niccum*⁶⁶ and *Beike v. Beike*⁶⁷ which both involved substantially similar fact situations. In all three cases none of the settlement agreements had contained any express language regarding the rewards of growth or risk of loss. In *Niccum* the court determined that:

Investment plans inherently include both the rewards of growth, and the risk of losses. Thus, absent express language stating otherwise, the settlement agreement of the parties implicitly contemplated both parties sharing all of the rewards and risks associated with an investment plan The valuation date merely provides a mutually agreed upon base amount to [w]hich any growth is added or loss is subtracted, and bars [Wife] from benefiting from any contributions made by [Husband] after the valuation date.⁶⁸

This rationale was followed by the court in *Beike*, and in *Shorter* the court defined the rule as this: "The principle that emerged from *Niccum* and has been applied since is that, *absent express language stating otherwise*, a settlement agreement dividing a pension plan implicitly contemplates that both parties will share all of the rewards and risks associated with an investment plan."⁶⁹

In reversing the trial court, the court of appeals noted that just as in *Niccum* and *Beike*, the *Shorter* settlement agreement did not contain any express language stating how gains or losses were to be divided.⁷⁰ Of particular importance, however, to the practitioner is a sort of warning voiced by the court.

We note especially that *Niccum* was decided well before the [Shorters] entered into the instant settlement agreement and thereby put Indiana citizens on notice that provisions of that sort would be interpreted in this manner. In the second place, it would have been easy enough to draft a provision utilizing language that unambiguously expressed an intention to award [Wife] an amount of cash in sum certain, as opposed to a portion of a pension plan. But, the parties did not do this.⁷¹

It would seem that the court is also saying that practitioners now have been put on notice and should take care in drafting settlement agreements involving pension benefits effectuated by a QDRO.

65. *Id.*

66. *Niccum*, 734 N.E.2d at 637.

67. *Beike*, 805 N.E.2d at 1265. For an analysis of *Beike*, see Ruppert & Ruppert, *supra* note 7, at 1090.

68. *Niccum*, 734 N.E.2d at 640.

69. *Shorter*, 851 N.E.2d at 386 (citation omitted) (emphasis added).

70. *Id.*

71. *Id.*

The case of *Nowels v. Nowels*,⁷² which was decided during the survey period, provides a good example of the difficulty that a court faces when attempting to value property. In this case the issue was the valuation of Husband's one-half interest in a business. Each side presented expert testimony giving opinions as to the value of the business that varied widely from each other and were calculated on different dates during the dissolution process.⁷³ In its findings, the trial court thoroughly analyzed the strengths and weaknesses of each expert's testimony and the evidence presented and placed a value on Husband's interest that was between the figures offered by each expert.⁷⁴ Husband challenged the valuation as arbitrary and unsupported by the evidence.⁷⁵ He also contended that it was erroneous because no expert had valued his interest as of the date of the final hearing.⁷⁶ In rejecting Husband's claims, the court of appeals reaffirmed the longstanding rule that "the marital estate is to be closed at the time of the filing of the petition for dissolution" of marriage but that a "trial court has broad discretion in determining the date upon which to value marital assets, and may select any date between the date of filing the petition for dissolution and the date of the final hearing."⁷⁷ In further expounding upon the "broad discretion" of the trial court, the court of appeals stated:

Additionally, a trial court has broad discretion in ascertaining the value of property in a dissolution action and its valuation will not be disturbed absent an abuse of that discretion. The trial court has not abused its discretion if its decision is supported by sufficient evidence and reasonable inferences therefrom. Even where the circumstances would support a different award, we do not substitute our judgment for that of the trial court.⁷⁸

In *Nowells*, although the trial court had declined to adopt either experts appraisal in its entirety, the court of appeals determined that the trial court's valuation was not arbitrary because of its "well-reasoned resolution of conflicting evidence."⁷⁹ The court concluded by stating that the "trial court was not obligated to adopt the specific" value assigned by either expert or the specific valuation date chosen by either expert.⁸⁰ The value placed on the business by the trial court was within the bounds of the evidence presented and within the trial

72. 836 N.E.2d 481 (Ind. Ct. App. 2005).

73. *Id.* at 484.

74. *Id.* The court found the value to be as of the date of the final hearing. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 485 (citing *Sanjari v. Sanjari*, 755 N.E.2d 1186, 1192 (Ind. Ct. App. 2001) (marital estate is to be closed at the time of filing of the petition for dissolution); *Wilson v. Wilson*, 732 N.E.2d 841, 845 (Ind. Ct. App. 2000) (court may select any valuation date "between the date of filing the petition for dissolution and the date of final hearing"))).

78. *Id.* (citations omitted).

79. *Id.* at 486.

80. *Id.* at 487.

court's broad discretion.⁸¹

In *Nowells* the parties presented extensive evidence regarding the value of the assets and the court was faced with the task of having to resolve conflicts—sometimes significant—in the evidence. However, the court has an equally difficult—if not more so—task when the parties present little or no evidence of the value of the marital assets. This was the task facing the court in *Perkins v. Harding*.⁸² In this case, Wife challenged the order dividing property on the grounds that it was incomplete and vague.⁸³ At trial, the parties failed to testify or present exhibits regarding the values of some of the assets and debts. As a result, the trial court attempted to evenly divide the property as best it could.⁸⁴ In affirming the trial court, the court of appeals extensively analyzed the history of the law in Indiana regarding the burden of establishing values for property in a dissolution and the risk a party runs when failing to introduce evidence as to the specific value of the marital property.⁸⁵ The court of appeals pointed out that it had to rest, more than two decades ago, who bears the burden of introducing specific values of marital property at a dissolution hearing and what happens when the trial court distributes marital property without specific evidence of value.⁸⁶ Prior to *In re Marriage of Church*, the court of appeals had taken the position that it was “an abuse of discretion for a trial court to distribute property without apprising itself of the value of the property.”⁸⁷ In the *Church* case, the court adopted the position that “any party who fail[ed] to introduce evidence as to the specific value of marital property at the dissolution hearing [was] estopped from appealing the distribution on the ground of trial court abuse of its discretion based on that absence of evidence.”⁸⁸

The court of appeals found that the *Perkins*' trial court had not abused its discretion in dividing the assets and liabilities. Additionally, the trial court placed the burden of dividing most of the value of assets and debts equally between the parties and had done the best it could regarding the unvalued assets and debts. The court stated:

In light of the state of the record before us, we find no error attributable to the court. See, e.g. *In Re Marriage of Larkin*, 462 N.E.2d 1338, 1344

81. *Id.*

82. 836 N.E.2d 295 (Ind. Ct. App. 2005).

83. *Id.* at 301.

84. *Id.*

85. *Id.*

86. *Id.* at 302. The case referred to by the court was *In re Marriage of Church*, 424 N.E.2d 1078, 1081-82 (Ind. Ct. App. 1981).

87. *Perkins*, 836 N.E.2d at 301 (quoting *In re Marriage of Church*, 424 N.E.2d at 1081-82). The *Church* court also pointed out that the law was further complicated by a line of cases which had upheld trial court's in the distribution of unvalued property when the property was not unique and did not “require expertise for evaluation or when the unvalued property [was] clearly of little value in relation to the entire marital estate.” *In re Marriage of Church*, 424 N.E.2d at 1082.

88. *Perkins*, 836 N.E.2d at 301 (quoting *In re Marriage of Church*, 424 N.E.2d at 1081).

(Ind. Ct. App. 1984) (finding no abuse of discretion in trial court's division of assets when parties had failed to provide evidence of the value of some assets at trial); *Showley v. Showley*, 454 N.E.2d 1230, 1231 (Ind. Ct. App. 1983) (rejecting Wife's claims "the trial court was required to *sua sponte* fill the evidentiary void when the parties failed to introduce evidence of value").⁸⁹

3. *Distribution Issues*.—Indiana Code section 31-15-7-5 governs the distribution of marital property and provides as follows:

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
 - (A) before the marriage; or
 - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to:
 - (A) a final division of property; and
 - (B) a final determination of the property rights of the parties.⁹⁰

Indiana Code section 31-15-7-5 has been determined by the Indiana appellate courts to "require[] the trial court to presume that an equal division of the marital property is just and reasonable" unless relevant evidence exists to the contrary and has been received by the court.⁹¹ The case of *Nowels v. Nowels*⁹² decided during the survey period provides just such an example of how the trial court can use Indiana Code section 31-15-7-5 to support an unequal division of marital property.⁹³ In *Nowels*, Wife suffered from muscular dystrophy with no expectation that she would be able to acquire employment in the future.⁹⁴ Wife

89. *Id.* at 302.

90. IND. CODE § 31-15-7-5 (2004).

91. *See* Capehart v. Capehart, 705 N.E.2d 533, 536 (Ind. Ct. App. 1999).

92. 836 N.E.2d 481 (Ind. Ct. App. 2005).

93. IND. CODE § 31-15-7-5 (2004).

94. *Nowels*, 836 N.E.2d at 487.

required constant assistance because she was unable to “lift herself or attend to her personal needs.”⁹⁵ The trial court awarded Wife sixty-three percent of the marital estate and explained the deviation by referring to the fact that Wife was disabled, could not work, had high medical and personal care expenses and Husband had “an extraordinarily high earning capability.”⁹⁶ Husband appealed arguing that the trial court committed error because Wife did not request an unequal division of property and Wife “did not present evidence to support a deviation from the statutorily presumptive equal division.”⁹⁷ The court of appeals rejected both of Husband’s arguments, determining that the evidentiary record supported the trial court’s explanation for the deviation and the record reflected sufficient evidence to support the deviation.⁹⁸ The court dismissed Husband’s suggestion that the “trial court may not deviate from the statutory presumption absent a specific request by a party” to do so.⁹⁹ There was no legal authority offered by the Husband to support the proposition that the “trial court may not deviate from the statutory presumption absent a specific request” to do so by a party and the court was not inclined to find as such.¹⁰⁰

An issue that has perplexed practitioners of family law for some time is whether a spouse’s Public Employee’s Retirement Fund (“PERF”) can be divided pursuant to a QDRO. This issue was dealt with in the case of *Everette v. Everette*.¹⁰¹ In this case, the trial court ordered that Husband’s PERF be divided pursuant to a QDRO as part of the equalization of the marital estate.¹⁰² Wife challenged this on appeal.¹⁰³ Indiana Code section 5-10.3-8-9(a) provides, in part, “All benefits, refunds of contributions, and money in the fund are exempt from levy, sale, garnishment, attachment, or other legal process. . . .”¹⁰⁴

Previously, the case of *Board of Trustees of Indiana Public Employees’ Retirement Fund v. Grannan*¹⁰⁵ dealt with the attachment or assignment of PERF benefits in the context of a dissolution of marriage.¹⁰⁶ In *Grannan*, the trial court had issued a QDRO and assigned one-half of the Husband’s PERF account balance to the Wife requiring that her “interest in the account be segregated for accounting purposes, and required PERF to pay directly to the Wife her share of

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 487-88.

101. 841 N.E.2d 210 (Ind. Ct. App. 2006).

102. *Id.* at 211.

103. Presumably Wife was seeking an adjustment of trial court’s division of the marital estate so that she would still receive an equal amount of the estate but without the PERF which would be credited against the Husband’s share.

104. IND. CODE § 5-10.3-8-9(a) (2005).

105. 578 N.E.2d 371 (Ind. Ct. App. 1991).

106. *Id.* at 375.

the benefits” which had been assigned by the QDRO.¹⁰⁷ In reversing the trial court, the court in *Grannan* stated that the “trial court had exceeded its authority by ordering assignment and attachment” pursuant to a QDRO.¹⁰⁸ The court stated:

[T]he husband’s PERF rights are an asset of the marriage subject to distribution. The marital dissolution statute offers the trial court two avenues if such an asset is to be distributed. The statutory language, “by setting aside to either of the parties a percentage of those payments *either by assignment or in kind at the time of receipt*,” offers the trial court a method of distribution which is not in violation of the PERF statutes against assignment and attachment. Because the statutes can be harmoniously construed, we find no supersedure or implied repeal of the PERF statutes. Thus, we order the trial court to enter a conforming order.¹⁰⁹

In *Everette*, the court of appeals “conclude[d] that the *Grannan* opinion [was] in error to the extent that it implie[d] that the PERF benefits themselves may be assigned in order to achieve distribution of that marital asset.”¹¹⁰ The *Everette* court felt that saying that PERF benefits themselves could be assigned would be contrary to the PERF statute’s prohibition against assignment of benefits. If “distribution of the PERF benefits [were] to be made in kind, such distribution would seem to be delayed until actual receipt of the benefits,”¹¹¹ which depending upon the age of the parties could be a significant number of years. The appellate court felt that the *Grannan* opinion seemed to be saying that Indiana Code section 31-15-7-4,¹¹² which authorized “assignment or distribution in kind was permitted under the PERF statute precluding such assignments.”¹¹³ However, because of the language of Indiana Code section 5-10.3-8-9(a) the *Everette* court concluded that the Husband’s PERF account was “exempt from levy, sale, garnishment, attachment, or other legal process” including a QDRO.¹¹⁴ The question then arises, if PERF is exempt from a form of levy, sale, garnishment, attachment or other legal process including a QDRO, does the spouse holding the PERF then, in effect, receive a greater share of the marital

107. *Everette*, 841 N.E.2d at 213 (citing *Grannon*, 578 N.E.2d at 373).

108. *Id.* (citing *Grannon*, 578 N.E.2d at 376).

109. *Grannan*, 578 N.E.2d at 376. The court was referring to what is now Indiana Code section 31-15-7-4.

110. *Everette*, 841 N.E.2d at 213.

111. *Id.*

112. The marital property distribution statute at the time *Grannan* was decided was codified as Indiana Code section 31-1-11.5-11. It is now re-codified at Indiana Code section 31-15-7-4. The relevant language has remained unchanged.

113. *Everette*, 841 N.E.2d at 213 (citation omitted). *Grannan* held that the QDRO in that case was invalid using the rationale cited earlier in this Article. The *Everette* court specifically rejected that rationale. *Id.*

114. *Id.* at 214 (quoting IND. CODE § 5-10.3-8-9(a) (2005)).

estate? The *Everette* court held that its ruling “does not leave the trial court without recourse to evenly divide the marital estate.”¹¹⁵ The court remanded to the trial court with an instruction that it was “to remove the language from the dissolution decree granting Wife any interest in Husband’s PERF account and otherwise adjust the decree to ensure that Wife still receives an equal share of the marital estate.”¹¹⁶

B. Spousal Maintenance Issues

A case decided on October 4, 2006¹¹⁷ was a first, of sorts, for the court of appeals. In the case of *Matzat v. Matzat*¹¹⁸ the court of appeals reversed an award of incapacity maintenance to a wife.¹¹⁹

In *Matzat*, the trial court awarded Wife incapacity maintenance.¹²⁰ Wife

115. *Id.* In this case, the parties had other assets that could be set over to the Wife to equalize the distribution of the estate. *Id.* Of course, if the one spouse’s PERF account is the only significant asset of the marital estate and could not be equalized by distribution of other marital assets another remedy would have to be found. Presumably, a court could order that the spouse holding the PERF pay to the ex-spouse a certain amount of each payment received.

116. *Id.*

117. Technically the period of this survey runs from October 1, 2005 to September 30, 2006. This case was included because it was of significance and decided so near to the survey period.

118. 854 N.E.2d 918 (Ind. Ct. App. 2006).

119. *Id.* at 919. This case was a first, of sorts, because the court noted:

While our research has not yielded a single, reported case in which this court has reversed the trial court’s grant or denial of an incapacity maintenance award on the basis of evidentiary sufficiency, it has also not produced a case where the evidence supporting an award was as meager as the one here.

Id. at 920; *cf.* *Frazier v. Frazier*, 737 N.E.2d 1220, 1224 (Ind. Ct. App. 2000) (trial court’s order characterizing “judgment as non-dischargeable maintenance or support” was reversed when no evidence supported a designation); *Coster v. Coster*, 452 N.E.2d 397, 403 (Ind. Ct. App. 1983) (because no evidence supported maintenance award, trial court’s order was held to be an installment payment of “the marital property division”).

120. *Matzat*, 854 N.E.2d at 919. In Indiana, post-decree spousal maintenance may be awarded by the trial court in a dissolution action where the recipient spouse is physically or mentally incapacitated so that it impairs his or her ability to support him or herself. The court may also award spousal maintenance if the recipient spouse is the custodial parent of an incapacitated child which requires the spouse to forego employment, and he or she lacks sufficient property to provided for his/her needs or for “rehabilitative maintenance” to improve job market ability. IND. CODE § 31-15-7-2 (2004). Concerning “rehabilitative maintenance,” Indiana Code section 31-15-7-2(3) provides:

(3) After considering:

- (A) The educational level of each spouse at the time of marriage and at the time the action is commenced;
- (B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or

“testified that she was seeking social security benefits” and “that she could no longer work as a certified nurse because she was unable to lift patients.”¹²¹ She also testified that she could no longer work “in data entry because it required her to sit for long periods of time.”¹²² The court awarded Wife incapacity maintenance and “COBRA insurance coverage until she beg[an] receiving social security disability benefits.”¹²³ Wife presented no medical evidence or testimony to support her claim of incapacity.¹²⁴ Husband filed a timely motion to correct errors, contending that the award of maintenance was in error and was an abuse of the trial court’s discretion.¹²⁵ Subsequent to the filing of the motion to correct errors, Husband discovered that Wife’s social security claim had been denied and, furthermore, that Wife had not claimed the same disability before the Social Security Administration as she had claimed at trial.¹²⁶ The trial court denied Husband’s proffer of evidence from the Social Security Administration, even though he had presented evidence that the denial letter from social security was not issued until after the final hearing.¹²⁷

In reversing the trial court, the court of appeals, citing *Augspurger v. Hudson*,¹²⁸ stated “a trial court’s decision to award maintenance is purely within its jurisdiction and we will only reverse if the award is against the logic and effect of the facts and circumstances of the case.”¹²⁹ A maintenance award is to help provide for a spouse’s support and “[t]he essential inquiry is whether the incapacitated spouse has the ability to support himself or herself.”¹³⁰ Here, Wife had presented no medical evidence to support her claim for incapacity. The court contrasted their holding in this case to that of *Paxton v. Paxton*¹³¹ where the court had held that “medical testimony was not required to support an award [of

child care responsibilities, or both;

(C) the earning capacity of each spouse, including educational background, training, employment skills, work experience and length of presence in or absence from the job market; and

(D) the time an expense necessary to acquire sufficient education and training to enable the spouse seeking maintenance to find appropriate employment;

a court may find that rehabilitative maintenance for the spouse who is seeking maintenance is necessary in an amount and for a period of time that the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

IND. CODE § 31-15-7-2(3) (2004).

121. *Matzat*, 845 N.E.2d at 919.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 920.

128. 802 N.E.2d 503, 508 (Ind. Ct. App. 2004).

129. *Matzat*, 854 N.E.2d at 920.

130. *Id.* (quoting *McCormick v. McCormick*, 780 N.E.2d 1220, 1224 (Ind. Ct. App. 2003)).

131. 420 N.E.2d 1346, 1348 (Ind. Ct. App. 1981).

maintenance]” where Wife was already receiving social security disability benefits because of her condition.¹³²

The case of *In re Marriage of Irwin*¹³³ addresses the issue of modification—in this case, termination of spousal incapacity maintenance. When the parties were divorced in 2002, the court found that Wife was entitled to incapacity maintenance in the amount of \$700 per month and required Husband to pay Wife’s COBRA premiums for a period of thirty-six months.¹³⁴ Wife was also required to apply for social security disability benefits, and in the event she was awarded such, Husband’s maintenance obligations would be reduced or eliminated.¹³⁵ The court further found that Wife’s future earnings would be limited.¹³⁶ Subsequent to the decree, Wife attempted to work as a medical-surgical nurse and also attempted to teach nursing at Ivy Tech but had lost both positions because she was “stressed easily and performed poorly.”¹³⁷ Despite this, Wife’s income from employment in the two years subsequent to the divorce increased to \$18,000 and \$19,000 respectively.¹³⁸

Husband filed a petition to modify the trial court’s award of support. After a hearing the court modified the previously ordered spousal maintenance and terminated the spousal maintenance award.¹³⁹ Wife appealed.

On appeal, the court reversed.¹⁴⁰ In reaching its decision, the court reviewed the law in Indiana that allows the trial court to order spousal maintenance payments. Although the circumstances under which a trial court may order spousal maintenance are limited in Indiana,¹⁴¹ Indiana Code section 31-15-7-2(1) allows for the award of “incapacity maintenance.”¹⁴² The court stated:

Indiana Code section 31-15-7-2(1) . . . allows a trial court to award maintenance to a spouse if it finds the spouse to “to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected[.]” Upon a finding of incapacity, the court may then find that maintenance for the

132. *Matzat*, 854 N.E.2d at 920-21.

133. 840 N.E.2d 385 (Ind. Ct. App. 2006).

134. *Id.* at 387.

135. *Id.*

136. *Id.* Wife’s average income for the last three years of the marriage due to her disability was \$6136. *Id.*

137. *Id.* at 391.

138. *Id.* at 390. In the two years following the divorce Wife had been turned down twice for social security but was also receiving unemployment compensation which, under Indiana Code section 22-4-14-3(a), requires an individual to be physically and mentally able to work. *Id.*

139. *Id.* at 388-89.

140. *Id.* at 393.

141. *Id.* at 390 (citing *Zan v. Zan*, 820 N.E.2d 1284, 1287 (Ind. Ct. App. 2005)). For a discussion of *Zan*, see Ruppert & Ruppert, *supra* note 51, at 1009.

142. *In re Marriage of Erwin*, 840 N.E.2d at 390 (citing *McCormick v. McCormick*, 780 N.E.2d 1220, 1223 (Ind. Ct. App. 2003)).

spouse is necessary during the period of incapacity, subject to further order of the court.¹⁴³

In order to modify or terminate an award of spousal maintenance the spouse who is seeking the modification or termination must make a showing of “changed circumstances so substantial and continuing” that the terms of the maintenance order had become unreasonable.¹⁴⁴ The court said:

As we stated in *Lowes* [*v. Lowes*], 650 N.E.2d at 1174, in determining whether a substantial change of circumstances has occurred to the point of making a maintenance award unreasonable, a trial court should consider the factors underlying the original award. Such factors include the financial resources of the party seeking to continue maintenance, the standard of living established in the marriage, the duration of the marriage and the ability of the spouse from whom the maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance.¹⁴⁵

While it was true that Wife’s income had increased and that her symptoms had improved somewhat, other factors in the original award, including the Wife’s inability to maintain stable employment, had remained unchanged.¹⁴⁶ Therefore, in analyzing the requirement for the finding of substantial and continuing circumstances, the court found that under the circumstances in the record, the complete termination of Wife’s maintenance was an abuse of discretion by the trial court.¹⁴⁷

C. Miscellaneous Issues

1. *Garnishment to Enforce Payment of Spouse’s Share of Former Spouse’s Military Pension.*—It has long been a settled issue that state courts have the authority to award a portion of disposable military retired pay to former spouses.¹⁴⁸ If the former spouse to whom payments are to be made was married to the armed forces member for a period of ten years or more during which the service member performed at least ten years of service credible in determining the member’s eligibility, then the former spouse’s payments can be made directly from the Department of Defense (“DOD”).¹⁴⁹ This direct payment mechanism is due to a provision commonly referred to as the 10/10 rule. More specifically, the Uniformed Services Former Spouses Protection Act (USFSPA) defines the 10/10 requirement as follows:

143. *Id.* (citations omitted).

144. *Id.* (citing on IND. CODE § 31-16-8-1(1) (2004)).

145. *Id.* at 391.

146. *Id.* at 392.

147. *Id.*

148. See *Mansell v. Mansell*, 490 U.S. 581, 583 (1989); *Warren v. Warren*, 563 N.E.2d 633 (Ind. Ct. App. 1990).

149. 10 U.S.C. § 1048(d)(2) (2000).

If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.¹⁵⁰

The question for the court to address in the case of *In re Marriage of Cope*¹⁵¹ was if the former spouse does not meet the requirements of the 10/10 rule for direct payment of an awarded share of military pension, can that spouse, nonetheless, enforce payment of their share through garnishment and proceedings supplemental against the current wages of their former spouse?¹⁵² In this case the parties entered into a property settlement which was approved by the trial court which provided for the division of Husband's military pension.¹⁵³ Wife could not secure direct payment from the DOD and Husband refused to pay, taking the position that if the DOD would not issue direct payment to Wife she would simply be "out of luck."¹⁵⁴ Pursuant to the provisions of Indiana Code section 31-15-7-10, Wife "initiated proceedings supplemental to enforce payment of her share of the pension through garnishment of [her ex-husband's] current wages."¹⁵⁵ After several hearings, the trial court issued its final order of garnishment and the ex-husband appealed.¹⁵⁶ The court of appeals affirmed.

The court of appeals determined that 10 U.S.C. § 1408(d)(2) only limited a former spouse's means of collecting his or her share of the military pension not their entitlement thereto.¹⁵⁷ In affirming the trial court, the court of appeals noted that the DOD provides for circumstances such as these and that the remedy "is for the retired member to make direct payments to his/her former spouse."¹⁵⁸

2. *Jurisdiction to Enforce Divorce Decree.*—The case of *Fackler v. Powell*,¹⁵⁹ which is a significant case regarding a trial court's continuing jurisdiction to enforce or interpret a decree concerning property, was decided

150. *Id.*

151. 846 N.E.2d 360 (Ind. Ct. App. 2006).

152. *Id.* at 363.

153. *Id.* at 361. The payment was to be "through either a qualified domestic relations order or other transfer mechanism approved by the DOD." *Id.*

154. *Id.* at 362.

155. *Id.*; IND. CODE § 31-15-7-10 (Supp. 2006) provides that awards concerning a dissolution of marriage decree may be enforced by assignment of wages or other income.

156. *In re Marriage of Cope*, 846 N.E.2d at 362.

157. *Id.*

158. *Id.* at 363. The court of appeals cited several government documents as well as provided relevant web site information. *See id.* The authors urge any practitioner who has a case involving military pay to review this case and make note of the resource information provided by the court.

159. 839 N.E.2d 165 (Ind. 2005).

during this survey period. However, the case was analyzed in the 2006 survey of Indiana Law.¹⁶⁰ The authors would refer the reader to that article.

II. CHILD CUSTODY AND PARENTING TIME

Custody and parenting time disputes are a very prominent area of Indiana family law. The following is a brief review of cases from the survey period.

A. *Right of First Refusal*

The court in *Shelton v. Shelton*¹⁶¹ discussed the opportunity for additional parenting time; more commonly referred to as the “right of first refusal”¹⁶² and held that the maternal grandmother was not a “family member” within the meaning of the Guidelines.¹⁶³ The court further held that a “family member” must be limited to a person within the same household as the parent with physical custody.¹⁶⁴ Therefore, the non-custodial parent should be offered the parenting time regardless of whether a non-household family member can care for the child.¹⁶⁵

B. *Rights of a Domestic Partner*

Whether a former domestic partner should be entitled to the legal rights of a parent such as parenting time rights, child support obligations, and other parental rights and responsibilities with respect to the Mother’s child was at issue in *King v. S.B.*¹⁶⁶ The facts set out in the complaint indicate that S.B. was “artificially inseminated with semen¹⁶⁷ donated by King’s brother” after the

160. See Ruppert & Ruppert, *supra* note 51, at 1009.

161. 835 N.E.2d 513 (Ind. Ct. App. 2005).

162. Indiana Parenting Time Guidelines (I)(C)(3) states in part, “When it becomes necessary that a child be cared for by a person other than a parent or a family member, the parent needing the child care shall first offer the other parent the opportunity for additional parenting time. . . .” IND. PARENTING TIME GUIDELINES (I)(C)(3).

163. *Shelton*, 835 N.E.2d at 518.

164. *Id.* at 517.

165. *Id.* at 518. Note the commentary to the Guidelines (I)(C)(3) that states:

The rule providing for opportunities for additional parenting time promotes the concept that a child receives greater benefit from being with a parent rather than a child care provider. It is also intended to be practical. When a parent’s work schedule or other regular recurring activities require hiring a child care provider, the other parent should be given the opportunity to provide the care. Distance, transportation or time may make the rule impractical. Parents should agree on the amount of child care time and the circumstances that require the offer to be made.

IND. PARENTING TIME GUIDELINES (I)(C)(3) cmt.

166. 837 N.E.2d 965, 966 (Ind. 2005).

167. The insemination took place in August 1998. *Id.* The child was born May 15, 1999. *Id.*

parties jointly decided to bear and raise a child together.¹⁶⁸ The parties' expenses were not covered by insurance but instead were paid by S.B. and King's joint bank account.¹⁶⁹ Until the relationship ended in January 2002, S.B. and King were equal parents in A.B.'s care and support. After the termination of their relationship, King continued to pay child support and have regular parenting time with A.B.¹⁷⁰

However, in July, 2003, S.B. decided to terminate parenting time and "began rejecting King's child support payments."¹⁷¹ The lawsuit began on October 31, 2003, when King sought to be recognized as A.B.'s legal parent and have the same "rights and obligations of a biological parent."¹⁷² King argued that even if the trial court did not find that she was entitled to the title of a legal parent, she "nonetheless acted in loco parentis and in a custodial and parental capacity," which should entitle her to at a minimum continued parenting time with A.B.¹⁷³ The biological mother of A.B. filed a motion to dismiss for failure to state a claim.¹⁷⁴ The trial court dismissed King's complaint. The court of appeals¹⁷⁵ reversed the trial court's decision holding that, by virtue of her agreement with A.B.'s mother, King is a legal parent.¹⁷⁶ The Indiana Supreme Court granted transfer, "thereby vacat[ing] the opinion of the court of appeals."¹⁷⁷ They also reversed the trial court's dismissal of King's complaint and remanded the case to the trial court for further proceedings.¹⁷⁸

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Indiana Trial Rule 12(B)(6) is a defense to a motion for "[f]ailure to state a claim upon which relief can be granted. . . ." IND. TR. R. 12(B)(6).

175. *In re A.B.*, 818 N.E.2d 126 (Ind. Ct. App. 2004), *vacated*, 837 N.E.2d 865 (Ind. 2005).

176. *Id.* at 132.

177. *King*, 837 N.E.2d at 966. Indiana Appellate Rule 58(A) states:

The opinion or not-for-publication memorandum decision of the court of appeals shall be final except where a Petition to Transfer has been granted by the supreme court. If transfer is granted, the opinion or not-for-publication memorandum decision of the court of appeals shall be automatically vacated except for: (1) those opinions or portions thereof which are expressly adopted and incorporated by reference by the supreme court; or (2) those opinions or portions thereof that are summarily affirmed by the supreme court, which shall be considered as court of appeals' authority. Upon the grant of transfer, the supreme court shall have jurisdiction over the appeal and all issues as if originally filed in the supreme court.

IND. APP. R. 58(A).

178. *King*, 837 N.E.2d at 967.

C. Parenting Time Rights of a Biological Parent

In *Duncan v. Duncan*,¹⁷⁹ Father adopted Mother's two children from a previous relationship, H.D. and R.D.¹⁸⁰ Another child, S.D. was born during the marriage. H.D. alleged more than ten years of molestation by her adoptive father.¹⁸¹ Mother left with all of the children and Father did not have any further contact with them. Father was arrested and charged with child molestation.¹⁸² The charges against Father were dismissed after he suffered a severe stroke during incarceration.¹⁸³ In March 2004, the parties' marriage was dissolved¹⁸⁴ and Mother was awarded sole custody of the parties' children with no visitation rights for Father at that time.

Father filed a Motion to Establish Parenting Time with the two youngest children¹⁸⁵ on February 18, 2005. After a hearing, the trial court denied Father's motion.¹⁸⁶ On appeal, Father raised the issue of whether the trial court abused its discretion by denying his Motion to Establish Parenting Time. While it is true that "Indiana has long recognized that the rights of parents to visit their children is a precious privilege that should be enjoyed by non-custodial parents,"¹⁸⁷ a court may deny those rights whenever it would serve the best interests of the children.¹⁸⁸ The appellate court reviewed several past decisions,¹⁸⁹ but this case

179. 843 N.E.2d 966 (Ind. Ct. App. 2006).

180. *Id.* at 968.

181. The alleged molestation increased in nature and frequency over the years but began with touching and forced oral sex when H.D. was five years old and progressed into intercourse by the time H.D. was eleven. *Id.* It was alleged that at age thirteen, H.D. told a neighbor about the abuse but was threatened by Duncan that he had a loaded gun before she talked to officials. *Id.* She recanted her story for two more years until she finally told her maternal grandmother at the age of fifteen. *Id.*

182. *Id.* Father was charged with child molestation as both a Class A and Class B Felony in January 2004. *Id.*

183. *Id.*

184. *Id.* A Dissolution Decree was entered on March 24, 2004. *Id.*

185. Both R.D. and S.D. are male children.

186. *Duncan*, 843 N.E.2d at 968. The hearing was held on May 17, 2005, and the order denying Father's motion was issued on June 10, 2005. *Id.*

187. *Id.* at 969 (citing *Lasater v. Lasater*, 809 N.E.2d 380, 400 (Ind. Ct. App. 2004)).

188. IND. CODE § 31-17-4-2 (Supp. 2005) ("The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development.")

189. See generally *Farrell v. Littell*, 790 N.E.2d 612 (Ind. Ct. App. 2003); *K.B. v. S.B.*, 415 N.E.2d 749 (Ind. Ct. App. 1981). In *K.B.*, the evidence that the inappropriate actions occurred were conflicting and evidence was presented to show the court that the visitation would not be harmful and if anything did happen in the past, it would not recur. This case differs from *K.B.* because H.D. was a credible teenage witness and had the backing of the Monroe County Division of Family and

broke ground as the first time it was confronted with a situation where the molestation allegedly occurred with one child but Father was requesting parenting time with the other children. Based on the facts of this case,¹⁹⁰ the appellate court concluded that “visitation between Father and his sons would endanger their physical health or significantly impair their emotional development.”¹⁹¹ Therefore, the trial court did not err in denying the requested parenting time.¹⁹²

D. Biological Parent vs. Third-Party

The issue in *In re Paternity of Z.T.H.*¹⁹³ was whether or not the parental presumption applies to a parent’s request to modify a third party’s custody. Z.T.H. was in the care and custody of his maternal grandparents, the Ketners, for more than ten years before Father petitioned the court for a modification of custody.¹⁹⁴ During the time that the child resided with the Ketners, Father remained an active part of his life including regular telephone contact, parenting time and attending the child’s school events. The child’s mother was not a part of the action to modify custody. The trial court held that the grandparents failed to rebut the parental presumption required to maintain custody of Z.T.H. and awarded custody of the child to his Father.¹⁹⁵

The Ketners appealed and argued that they should not be required to rebut the position because they had been the child’s primary custodians for such an extended period of time.¹⁹⁶ They further contended that the burden of proof fell to Father to show a substantial change in circumstances that would make the modification of custody in the best interests of the child. Alternatively, the Ketners argued that “even if a parental presumption applies to cases in which the child has been in the long-term permanent custody of a third party, the parental presumption is waived where the parent voluntarily relinquishes custody pursuant [to] a written custody agreement.”¹⁹⁷

The appellate court compared the facts of Z.T.H. with several prior Indiana

Children. Moreover, besides an adamant denial, Father did not present any evidence to the contrary. *Farrell* was different because there was little to no evidence to support the allegations.

190. The important facts considered by the court were Father’s lack of remorse for his behavior and abuse of H.D. including the threat with a loaded gun and his refusal to attend counseling. The court also noted that although Mother told the court that he was a good father to the boys, neither of the boy’s desired visitation or a relationship with their father. *Duncan*, 843 N.E.2d at 971. Further, R.D. had a rocky relationship with his father and S.D. was just beginning to benefit from therapy. *Id.* at 972.

191. *Id.*

192. *Id.*

193. 839 N.E.2d 246 (Ind. Ct. App. 2005).

194. *Id.* at 248.

195. *Id.*

196. *Id.* at 249.

197. *Id.*

cases.¹⁹⁸ However, none of the cases addressed “the proper analysis where a parent seeks to modify a long-term permanent third party custody arrangement and there has not been a significant change in circumstances that led to the parent initially relinquishing custody.”¹⁹⁹ Z.T.H.’s Father relinquished custody based on his fears of being a single, young father.²⁰⁰ There was no evidence that he significantly improved his circumstances from when he voluntarily relinquished custody. The appellate court was faced with a scenario in which they needed to combine the parental presumption with the longstanding concept that “permanence and stability are considered best for the welfare and happiness of the child.”²⁰¹

The court developed a two-step approach for dealing with such cases where a parent seeks to modify custody when a third-party has been a long-time permanent custodian for the child(ren).²⁰² Their approach protects both the best interests of the child and the constitutional rights of the parents.²⁰³ First, the third party is required to rebut the parental presumption.²⁰⁴ If the third party is successful at the rebuttal, the “third party and the parent are on a level playing field, and the parent seeking to modify custody must establish the statutory requirements for modification by showing that modification is in the child’s best interests and there has been a substantial change in one or more of the enumerated factors.”²⁰⁵

The main error that the appellate court found in the trial court’s ruling was its conclusion that the Ketners failed to rebut the parental presumption after

198. See *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002) (involving an initial custody determination between a father and a step-father after the death of the child’s mother and requiring a third party to rebut the parental presumption by showing that it is not in the child’s best interests to be placed with the parent and to show that it is the child’s best interests to be placed with the third party); *In re Paternity of V.M.*, 790 N.E.2d 1005, 1108-09 (Ind. Ct. App. 2003) (applying the analysis from *B.H.* where a father voluntarily relinquished custody to the children’s maternal grandmother and then sought a modification of custody after he significantly turned his life around, the court found for the grandparents under the presumption that it was in the best interests of the children to be in the custody of their natural parent and required the grandparents to rebut the parental presumption.); *In re Guardianship of L.L.*, 745 N.E.2d 222, 230-31 (Ind. Ct. App. 2001) (“[T]here is a presumption in all cases that the natural parent should have custody of his or her child. The third-party bears the burden of overcoming this presumption by clear and cogent evidence. . . . If the presumption is rebutted, then the court engages in a general ‘best interests’ analysis.”).

199. *In re Paternity of Z.T.H.*, 839 N.E.2d at 251-52.

200. *Id.* at 253.

201. *Id.* at 252 (citing *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992)).

202. *Id.*

203. *Id.* at 253.

204. The presumption must be rebutted with “evidence establishing the natural parent’s unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third party[.]” *In re Guardianship of B.H.*, 770 N.E.2d at 287.

205. *In re Paternity of Z.T.H.*, 839 N.E.2d at 252-53.

finding that Z.T.H.'s Father acquiesced to the Ketners custody of his child.²⁰⁶ The appellate court reminded its readers that "Indiana courts have continuously recognized that the parental presumption may be rebutted with evidence of a parent's 'long acquiescence' in a third party having custody of a child."²⁰⁷ The Ketners "should have been in the same position as any custodial parent objecting to a petition to modify custody";²⁰⁸ therefore, the appellate court remanded Z.T.H. for a hearing where Father "has the burden of establishing that the modification of custody is in Z.T.H.'s best interests and that there has been a substantial change in circumstances."²⁰⁹

III. CHILD SUPPORT

A. Credit for Parenting Time

In *Fuchs v. Martin*,²¹⁰ the custodial parent, Mother, was given a credit in the amount of \$36.00 for "parenting time" on line seven of the child support obligation worksheet that the trial court attached to its order. Father, the non-custodial parent, asserted that the "parenting time" credit could only be given to the non-custodial parent.²¹¹ The appellate court agreed and found that Mother cannot be entitled to the credit according to the plain language of the Guidelines.²¹² Only a non-custodial parent can receive a monetary credit for "parenting time." The child support order was remanded back to the trial court to enter a corrected order.²¹³

B. Negative Support

*Grant v. Hager*²¹⁴ was a case of first impression that addressed whether a custodial parent could be ordered to pay child support to a non-custodial parent. In this case, Father earned significantly less income than Mother and exercised

206. *Id.* at 257.

207. *Id.* (quoting *Hendrickson v. Binkley*, 316 N.E.2d 376, 380 (Ind. App. 1974)).

208. *Id.*

209. *Id.*

210. 836 N.E.2d 1049 (Ind. Ct. App. 2005).

211. See IND. CHILD SUPPORT GUIDELINES 3(G)(4) (2004) (stating that "[t]he court may grant the noncustodial parent a credit towards his or her weekly child support obligation (Line 6 of the worksheet) based upon the calculation from a Parenting Time Credit Worksheet").

212. The court refers its readers to the commentary on Indiana Child Support Guideline 6, which explains how to compute the credit. It says in part:

The apportionment of credit for "transferred" and "duplicated" expenses will require a determination of the annual number of overnights of parenting time exercised by the parent who is to pay child support, the use of the standard Child Support Obligation Worksheet, a Parenting Time Table, and a Parenting Time Credit Worksheet.

IND. CHILD SUPPORT GUIDELINES 6 cmt.

213. *Fuchs*, 836 N.E.2d at 1060.

214. 853 N.E.2d 167 (Ind. Ct. App. 2006).

substantial parenting time with the parties' two children. Once the appropriate parenting time credits were subtracted from Father's child support, his obligation was a negative number. The trial court ordered Mother to pay Father an amount equal to the negative amount. Mother appealed. Father argued that non-custodial parents may be paying their obligations twice if they participate in shared parenting time.²¹⁵ He reasoned that they are required to provide the same basic living environment as the custodial parent and still pay the same child support obligation. The appellate court closely followed the language of the child support guidelines²¹⁶ and its commentary and reversed the trial courts decision.²¹⁷ The appellate court held "that the present Indiana Child Support Guidelines, while authorizing the use of a Parenting Time Credit to *reduce* the support obligation of a noncustodial parent, do not permit the application of the credit in a manner that requires a custodial parent to pay support to a noncustodial parent."²¹⁸

C. Birth Expenses

In *K.T.P. ex rel. A.S.P v. Atchison*,²¹⁹ the State of Indiana appealed the denial of full reimbursement for expenses they argued were "birth expenses" of K.T.P.²²⁰ The State argued that "[u]nder Indiana Code § 31-14-17-1,²²¹ a court in a paternity action must order a father to pay for at least fifty percent of the expenses of pregnancy and childbirth."²²² The trial court agreed and ordered A.S.P. to pay one-half of certain expenses that were directly related to the child's

215. For the court's purpose, "shared parenting time refers to a situation where a noncustodial parent exercises more than the traditional amount of parenting time, that is, more than approximately fifty-two overnights (or 14% of the overnights) per year." *Id.* at 170; *see* IND. CHILD SUPPORT GUIDELINE 6 cmt.

216. Indiana and our Child Support Guidelines currently follow the Income Shares Model of child support. *See* IND. CHILD SUPPORT GUIDELINE 1.

217. However, it is important to note that the appellate court sympathized with Father's arguments and reminded its readers that "the federal Family Support Act requires that each State review their child support guidelines at least once every four years." *Grant*, 853 N.E.2d at 174 (citing 42 U.S.C. § 667 (2000)). The court went on to say that "Father presents an issue that may be of considerable interest upon our State's next review." *Id.* In closing, and in reference to Father's concerns, the court said in part, "these and other concerns are best addressed by the judicial committees charged with that review rather than by this Court." *Id.* at 175.

218. *Id.* at 167-68.

219. 848 N.E.2d 280 (Ind. Ct. App. 2006).

220. *Id.* at 281.

221. IND. CODE § 31-14-17-1 (2004) states that "[t]he court shall order the father to pay at least fifty percent (50%) of the reasonable and necessary expenses of the mother's pregnancy and childbirth, including the cost of: (1) prenatal care; (2) delivery; (3) hospitalization; and (4) postnatal care."

222. *K.T.P.*, 848 N.E.2d at 282.

birth.²²³ However, the trial court did not order A.S.P. to pay any of the expenses incurred after the child's birth and before this action. The court relied on Indiana Code section 31-14-17-1 and held that "birthing expenses" did not include expenses that are not directly related to the birth of the child.²²⁴ The trial court's decision was affirmed.²²⁵

D. Retroactive Modification

The court in *Whited v. Whited*²²⁶ affirmed the trial court's decision to retroactively modify Father's child support and give him credit for extended parenting time. The amount of the child support for three of the parties' children was at issue.²²⁷ The children resided in Indiana with Father, and with Mother in Florida at sporadic times during their upbringing. In determining Father's child support arrearage, the trial court retroactively gave Father a credit for 183 overnights per year.²²⁸ Mother argued that Father should not have been given a credit for overnights²²⁹ for the time that the children were residing with him.²³⁰ While the court acknowledged the long standing case law and public policy in Indiana against modifying custody outside of written orders from the court,²³¹ it

223. *Id.* A.S.P. was ordered to and agreed to pay one-half of prenatal, birthing, and delivery expenses.

224. *Id.*

225. *Id.* at 281.

226. 844 N.E.2d 546, 532 (Ind. Ct. App. 2006), *aff'd in part, rev'd in part*, 859 N.E.2d 657 (Ind. 2007).

227. The parties had four children but only three of them survived into adulthood. This matter only concerns the three surviving children. *Id.* at 548.

228. *Id.* at 551. Although some of the children practically resided with Father, there was not a legal change of custody that eliminated Father's child support obligation. The maximum overnights that a party can be credited for pursuant to the Indiana Parenting Time Guidelines are 183. *Id.*

229. Mother argued that the 1991 guidelines that were in place when the original support order was issued should apply and that the earlier guidelines did not calculate for overnights unless they were mentioned in the order. The appellate court found that the trial court did not harm Mother by using the new Guidelines because the older guidelines provided for a fifty percent abatement in child support for extended parenting time. *Whited*, 844 N.E.2d at 553. The credit that Father is receiving under the trial courts order is slightly less than that with the maximum 183 overnights allowed. *Id.*

230. Mother admitted that Father was very good about paying his child support and that she did not contend that he owed her any additional money from the time that the children resided with him. *Id.* at 548. Father paid his child support and did an automatic calculation of what he owed to Mother by reducing his weekly amount by one-third for each child that was residing with him at any given time. Mother never paid Father any support for the times that the children resided with Father. *Id.*

231. See *Nill v. Martin*, 686 N.E.2d 116, 117 (Ind. 1997).

also recognized that there are exceptions to the rule.²³² The court held that the parties had an implied contract regarding custody that warranted a credit to Father.

E. Imputing Income

The court of appeals addressed an area of first impression regarding the imputation of income during incarceration in *Lambert v. Lambert*.²³³ The parties in *Lambert* entered into a preliminary agreement during the pendency of their divorce whereby Father would pay Mother \$277 per week in child support based on his earnings as a computer consultant.²³⁴ Before the final decree was entered, Father was incarcerated.²³⁵ For child support purposes, the trial court imputed Father's income consistent with his income prior to his incarceration.²³⁶ Father argued that he would not be able to obtain employment in that field again due to his conviction.²³⁷ The trial court did not sympathize with Father and held that his

232. See *Isler v. Isler*, 425 N.E.2d 667, 670 (Ind. Ct. App. 1981) ("We are of the opinion that a narrow exception to the rule may exist in a case where the obligated parent, by agreement with the custodial parent, has taken the child or children into his or her home, has assumed custody of them, has provided them with food, clothing, shelter, medical attention, and school supplies, and has exercised parental control over their activities and education for such an extended period of time that a permanent change of custody is demonstrated. In such a case the court may, in its sound discretion, allow credit against the accrued support for the reason that the obligated parent has merely furnished support in a different manner under circumstances easily susceptible of proof.").

233. 839 N.E.2d 708 (Ind. Ct. App. 2005). After the closing of the survey period but before publication of this article, this court of appeals opinion was vacated by the Indiana Supreme Court on February 22, 2007. *Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007). The court stated that "[w]hile our Child Support Guidelines obligate every parent to provide some support even when they have no apparent present income, it was error to set support based on employment income that plainly would not be there during incarceration." *Id.* Going further, the court acknowledged that "[t]he Court of Appeals was correct to note that most criminal activity reflects a voluntary choice, and carries with it the potential for incarceration and consequent unemployment." *Id.* at 1180. However, the supreme court distinguished incarceration from voluntary underemployment. Child support computations should include and consider only the obligor's actual income or resources available from other sources (i.e. rental income, trust funds, inheritances). The supreme court decision in *Lambert* only "counsels against imputing pre-incarceration wages, salaries, commissions, or other employment income to the individual." *Id.* at 1182. The court's decision reminds its readers that "a court could well order an increased support payment as soon as the incapacity caused by prison is removed from a non-custodial parent's ability to earn income." *Id.* The burden to modify would then fall on the previously incarcerated parent.

234. Father made approximately \$1500 per week. *Id.* at 711.

235. Father had been charged with the molestation of two of his nieces before the preliminary agreement was executed but had not been convicted. *Id.*

236. *Id.* at 712.

237. *Id.*

incarceration was due to his voluntary actions.²³⁸ The trial court's holding was supported by previous Indiana Appellate decisions²³⁹ that found "that an obligor parent must take responsibility for crimes that he/she commits, and all of the consequences which flow from them."²⁴⁰

Father argued that the fact scenarios in the earlier cases do not apply because the parties were seeking a modification of child support due to incarceration. In *Lambert*, the court was making its initial determination of child support with imputed income information. After reviewing the prior Indiana decisions, the trial court was clear that incarceration due to "voluntary criminal conduct is not a valid rationale for abatement of an existing child support obligation."²⁴¹ However, the question posed to the court in *Lambert* was whether the same applied when the court is making an initial determination of an obligation. Case law from other states was not much guidance to the Indiana courts because they had decided both for and against the imputation based on incarceration.²⁴² The appellate court in *Lambert* decided that incarcerated parents should be treated the same as voluntarily underemployed parents. They reasoned that "[n]ot only is incarceration a foreseeable result of voluntary criminal conduct, but conviction of a crime necessarily imputes some fault to the perpetrator, fault for which he should not be rewarded with a lower child support obligation than he would have otherwise."²⁴³ Although the court affirmed the trial court's decision, it also noted that "a contempt finding would likely be inappropriate for any arrearage that accrues Father while incarcerated."²⁴⁴ The court also noted that any resources referred to in the Indiana Child Support Guideline 3(A)(1)²⁴⁵ that become available to Father during his incarceration should also be available to support his children.²⁴⁶

238. *Id.*

239. *See, e.g.,* Holsapple v. Herron, 649 N.E.2d 140, 142 (Ind. Ct. App. 1995); Davis v. Vance, 574 N.E.2d 330, 331 (Ind. Ct. App. 1991).

240. *Lambert*, 839 N.E.2d at 712.

241. *Id.* at 713.

242. *See, e.g.,* *In re Marriage of Rottschiet*, 664 N.W.2d 525, 535 (Wis. 2003) ("[I]ncarceration is an appropriate factor for courts to consider in reviewing a motion for modification, but the fact of incarceration alone is insufficient for a court to modify, or refuse to modify, a child support order."); *Logan v. Bush*, 621 N.W.2d 314, 318 (N.D. 2000) ("[I]mputation of income was authorized . . ."); *Koch v. Williams*, 456 N.W.2d 299, 300 (N.D. 1990) ("[A] child support obligor's incarceration . . . does not constitute a material change of circumstances justifying a modification of child support payments."); *Parker v. Parker*, 447 N.W.2d 64, 66 (Wis. Ct. App. 1989) ("[C]hild support need automatically not terminate during incarceration.").

243. *Lambert*, 839 N.E.2d at 714.

244. *Id.* at 715.

245. The Indiana Child Support Guidelines state in part "pensions, interest, trust income, annuities, capital gains, social security benefits, workmen's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, [and] prizes." IND. CHILD SUPPORT GUIDELINES 3(A)(1).

246. *Lambert*, 839 N.E.2d at 715.

Another case of first impression dealing with the imputation of income was *Meredith v. Meredith*.²⁴⁷ The Father in *Meredith* took a voluntary early retirement in order to increase the amount of his monthly pension.²⁴⁸ The trial court annualized his income using tax returns from the three prior years when determining whether his child support obligation should be modified.²⁴⁹ Father appealed the trial court's calculation because his federal tax returns showed overtime that was irregular income.²⁵⁰ The appellate court agreed that Father became voluntarily underemployed when he took the early retirement but held that in this case, "[t]he inclusion of overtime pay in the determination of Father's potential income would force him to work to his full potential or make career decisions based strictly upon the size of his paycheck."²⁵¹ In its decision to reverse and remand the matter for a calculation consistent with its decision, the appellate court suggested calculating Father's income using the hourly rate he was making before his retirement or the amount of his pension plus an imputation at minimum wage.²⁵²

F. Social Security Disability

In *Brown v. Brown*,²⁵³ the Indiana Supreme Court addressed the application of Social Security disability payments to child support. Father was disabled and his son received a lump sum for payment of retroactive disability benefits.²⁵⁴ At the time of the payment, Father had accrued a substantial arrearage on his child support obligation and sought to have the lump sum that his son received applied to his arrearage.²⁵⁵ He also sought to have the monthly payments that his son would receive in the future credited towards his weekly child support obligation. The trial court held that Father was not entitled to a credit on his obligation from the lump sum payment to his son.²⁵⁶ The appellate court affirmed that

247. 854 N.E.2d 942 (Ind. Ct. App. 2006).

248. *Id.* at 945.

249. Father filed his motion for modification of child support on February 24, 2004, and took early retirement on April 1, 2004. *Id.*

250. While the Indiana Child Support Guidelines state that all overtime and bonus can be included when calculating income, it is also a very sensitive area. IND. CHILD SUPPORT GUIDELINES 3(A).

251. *Meredith*, 854 N.E.2d at 949; *see also In re Paternity of Buehler*, 576 N.E.2d 1354, 1356 (Ind. Ct. App. 1991).

252. *Meredith*, 854 N.E.2d at 950. The court also noted that the trial court may wish to include a requirement that Father pay an additional percentage of any additional income he may earn from continued occasional work for his previous employer. *Id.*

253. 849 N.E.2d 610 (Ind. 2006).

254. *Id.* at 612.

255. *Id.*

256. *Id.*

decision.²⁵⁷ Father sought transfer and it was granted.²⁵⁸

The court reviewed the rationale from previous decisions²⁵⁹ and in a much anticipated decision, held that a disabled child support obligor was entitled to a credit against child support obligations for Social Security disability payments paid to child.²⁶⁰ The court did articulate some guidelines and principles for application of the credit for lump-sum retroactive benefits towards a child support obligation. First, the payment of retroactive “benefits cannot be credited against child support arrearages” that existed before the filing of a petition to modify child support based on the disability.²⁶¹ The court acknowledged that disabled persons have no influence on the amount of time the government takes to determine benefits and recommended that the disabled party should file his or her petition to modify, thus giving notice to all parties that the receipt of benefits is a possibility.²⁶² The trial court could then defer its ruling and wait for a decision from the government.²⁶³ Once a decision is made regarding the receipt of benefits, the trial court can order a retroactive modification of support back to the date of filing the petition to modify. However, note that “the filing of the petition does not relieve the parent of the parent’s child support obligation until

257. *Id.*

258. *Id.*

259. In *Poynter v. Poynter*, the Indiana Court of Appeals held that a “disabled parent is entitled to have child support obligations credited with the Social Security disability benefits received by the child because of that parent’s disability.” 590 N.E.2d 150, 152 (Ind. Ct. App. 1992). The court in *Brown* did not follow this rationale after reviewing *Stultz v. Stultz*, 659 N.E.2d 125 (Ind. 1995), a subsequent supreme court case. *Brown*, 849 N.E.2d at 614. *Stultz* involved a party seeking credit for social security retirement benefits received by his children. The trial court denied such credit in *Stultz*, but following *Poynter*, the court of appeals reversed. The supreme court in *Stultz* held that the benefits paid to children are only a factor in determining whether a credit should be applied and the trial court has discretion in determining when to apply such a credit. *Stultz*, 659 N.E.2d at 128. Although *Stultz* was not decided based on the difference between retirement and disability payments, the court did include that a disability recipient may have a stronger case for applying a credit than a retirement recipient. *Brown*, 849 N.E.2d at 614. The court in *Stultz* deferred making a definitive holding on that issue until there was a case on point and *Brown* is just that. *Id.*

260. *Brown*, 849 N.E.2d at 611. The court did not revisit its holding in *Stultz* regarding trial court discretion with respect to retirement benefits. *Id.* The court compared the differences between Social Security disability and Social Security retirement benefits and said “[d]isability impacts a parent’s earning capacity and, therefore, a child’s standard of living, in a fundamentally different way than does retirement. The trial court is in the best position to assess the impact of retirement in any particular case.” *Id.*

261. *Id.* at 615. The requirement of a petition to modify stems from Indiana Code section 31-16-16-6 which prohibits “retroactively modify[ing] an obligor’s duty to pay a delinquent support payment.” *Id.* (alteration in original).

262. *Id.* The court followed the guidance of the Michigan Court of Appeals in *Jenerou v. Jenerou*, 503 N.W.2d 744, 746 (1993).

263. *Brown*, 849 N.E.2d at 615.

such time as there is a modification, if any, of the existing child support order.”²⁶⁴ An obligor’s arrearage will continue to accrue pending the receipt of benefits. Secondly, any over payment that is made by the credit of the lump sum will be treated as a gratuity and not a payment advance on a future obligation.²⁶⁵ The same may be true “where prospective Social Security disability benefits paid to children exceed the amount of the parent’s corresponding child support payment.”²⁶⁶ In that situation, the disabled party would be well served to seek a modification of his or her weekly obligation to reflect the benefits.

The trial court decision in *Dedek v. Dedek*²⁶⁷ was reversed after the ruling in *Brown*.²⁶⁸ With facts very similar to those in *Brown*, Father sought to have a lump sum payment of Social Security disability benefits made to his children applied retroactively to his child support arrearage.²⁶⁹ The trial court denied his request, but pursuant to *Brown*, the appellate court reversed that decision and held that “Father is entitled to a credit against his arrearage, but only for the arrearage accumulated *after* he filed his petition to modify his child support based on his disability.”²⁷⁰ This case was remanded back to the trial court to determine the child support arrearage at the time the petition to modify was filed.²⁷¹ Another issue in *Dedek* was Father’s direct payments that he made to Mother. The trial court looked at the language in the parties’ divorce decree that stated that the child support payments “shall be paid to the Clerk of Monroe County”²⁷² and held that because the payments were made to Mother and not the Clerk, the payments should be credited as payment for the children’s educational expenses.²⁷³ The appellate court found that analysis to be clearly erroneous and held that the payments should have first been applied to his child support arrearage.²⁷⁴

264. *Id.* The court referenced *Tarbox v. Tarbox*, 853 A.2d 614, 621 (Conn. App. Ct. 2004).

265. *Brown*, 849 N.E.2d at 616.

266. *Id.*

267. 851 N.E.2d 1048, 1049 (Ind. Ct. App. 2006).

268. *Dedek* was decided on August 3, 2006; just over one month after the decision in *Brown* was handed down by the Indiana Supreme Court.

269. *Dedek*, 851 N.E.2d at 1049.

270. *Id.* (emphasis added).

271. Unfortunately for the father in this case, his petition to modify was not filed until December 14, 2005, just two days before the lump sum payment was made on December 16, 2004. Although the trial court was legally and technically reversed, the impact would be essentially the same in this case with or without retroactive application to the date of filing the petition.

272. *Dedek*, 851 N.E.2d at 1052.

273. *Id.* Mother never made a claim that Father was in arrears on his obligation to pay fifty percent of the children’s educational expenses. Furthermore, she admitted to receiving the payments from Father. The court relied on *Nill v. Martin*, 686 N.E.2d 116, 118 (Ind. 1997), in finding that “[c]redit has been allowed for payments that do not technically conform to the original support decree.” *Dedek*, 851 N.E.2d at 1052. Historically, courts give credit for payments where sufficient evidence is shown to prove the payments were made. *Id.*

274. *Dedek*, 851 N.E.2d at 1049.

G. Post-Secondary Educational Expenses

In *Borum v. Owens*,²⁷⁵ Father appealed the trial court's decision that denied his petition to modify the payment of college expenses for his daughter.²⁷⁶ Father filed his petition to modify on April 26, 2005, in anticipation of his daughter's upcoming wedding²⁷⁷ alleging that her marriage was "additional evidence of her emancipation."²⁷⁸ Father relied on Indiana Code section 31-16-8-1(1) which allows for modification only "upon a showing of changed circumstances so substantial and continuing as to make the current terms unreasonable."²⁷⁹ The appellate court considered the additional income to which Daughter would have access as a result of being married and sharing expenses with her husband.²⁸⁰ The appellate court reversed the trial court decision and held that Father had "established a change in circumstances so substantial and continuing as to make the terms of the May 17, 2004 order unreasonable."²⁸¹

H. Foreign Judgments

Another matter of first impression was whether a domesticated foreign judgment which included post-judgment interest at the forum state's rates was entitled to full faith and credit. In *Johnson v. Johnson*,²⁸² a Washington State child support judgment was domesticated in Indiana. The Washington judgment provided for post-judgment interest at the rate of twelve percent.²⁸³ Father argued that the post-judgment interest should be calculated pursuant to Indiana's rate of eight percent.²⁸⁴ Mother argued that the interest should be calculated based on the state that rendered the judgment.²⁸⁵ The appellate court agreed with Mother and concluded that

275. 852 N.E.2d 966 (Ind. Ct. App. 2006).

276. According to his divorce decree, Father was required to pay ninety-two percent of his daughter's remaining college expenses after scholarships and grants and Mother was to pay eight percent. *Id.*

277. *Id.* at 968. Daughter planned to, and in fact did, marry her fiancée on June 11, 2005. *Id.*

278. She had been formally emancipated by the court on May 17, 2004, but it was subject to her parent's continued duty to contribute to her college expenses. *Id.*

279. *Id.* at 969 (citing IND. CODE § 31-16-8-1(1) (2004)).

280. *Id.* at 970. In summary, Daughter's fiancée testified that he made approximately \$40,000 to \$44,000 per year and that he and Daughter would continue to reside in her current apartment after their marriage. Father made \$41,000 in 2004. *Id.*

281. *Id.*

282. 849 N.E.2d 1176, 1177 (Ind. Ct. App. 2006).

283. *Id.* at 1178.

284. *Id.*

285. *Id.*; see also *Mahl v. Aaron*, 809 N.E.2d 953, 959 (Ind. Ct. App. 1994), *aff'd sub nom. Aaron v. Scott*, 851 N.E.2d 309 (Ind. Ct. App. 2006), *trans. denied*, 2007 LEXIS 45 (Ind. 2007) (judgment from a sister state that is domesticated in an Indiana court will be given full faith and credit).

a domesticated foreign judgment that provides for post-judgment interest at the rendering state's statutory rate is entitled to full faith and credit in Indiana as to both principle and post-judgment interest at the rendering state's rate, unless the judgment debtor can show that the enforcement of the post-judgment interest part of the judgment would violate Indiana public policy.²⁸⁶

Pursuant to the Indiana Code, it is possible to have interest applied to delinquent child support payments at the rate of eighteen percent.²⁸⁷ Father was unable to show that Washington's interest rate was against Indiana public policy because Indiana's "legislature has determined that it is [the] state's public policy to allow a higher rate of interest on delinquent child support payments than the rate ordered here under Washington state law."²⁸⁸

IV. RELOCATION

Effective July 1, 2006, the law in Indiana regarding relocation changed substantially with the implementation of the new relocation statute.²⁸⁹ Relocation occurs when there is a change in an individual's residence for at least sixty days.²⁹⁰ The new statute applies to non-relocating individuals²⁹¹ and parents as well as relocating individuals.²⁹² A relocating individual must give appropriate notice,²⁹³ within the prescribed period²⁹⁴ prior to his or her relocation to all non

286. *Johnson*, 849 N.E.2d at 1180.

287. *Id.* at 1179 (citing IND. CODE § 31-16-12-2 (2004)). The statute provides:

The court may, upon a request by the person or agency entitled to receive child support payments, order interest charges of not more than one and one-half percent (1 1/2%) per month to be paid on any delinquent child support payment. The person or agency may apply for interest if support payments are not made in accordance with the support order. Accrued interest charges may be collected in the same manner as support payments under IC [section] 31-16-9.

IND. CODE § 31-16-12-2. However, even if the court found that the appropriate application of interest was Indiana's rate, the higher rate would not apply because it must be specifically requested by the parent seeking its application. *Johnson*, 849 N.E.2d at 1179 (citing *Caldwell v. Black*, 727 N.E.2d 1097, 1100 (Ind. Ct. App. 2000)).

288. *Johnson*, 849 N.E.2d at 1179.

289. IND. CODE § 31-17-2.2 (Supp. 2006) (repealing IND. CODE §§ 31-17-2-4, -23 (2004)).

290. *Id.* § 31-9-2-107.7.

291. Any person who has custody, parenting time or grandparent visitation with a child or someone who has filed a legal action seeking custody, parenting time or grandparent visitation with a child. *Id.* § 31-9-2-84.6.

292. A person who has custody or parenting time with a child or is seeking custody of parenting time, and intends to move his or her principal residence. *Id.* § 31-9-2-107.5. Grandparents with visitation rights do not fall under the term of relocating individuals. *Id.*

293. The notice must include the address and mailing address of the relocating individual's new residence, the home and other telephone numbers for the relocating individual; the date the

relocating individuals and file the notice with the clerk of the court that issued the custody or parenting order.²⁹⁵ If that provision is not applicable, he or she must file the notice with the clerk of the court having jurisdiction over custody or parenting time with the child.²⁹⁶ The nonrelocating parent can file a motion objecting to the child's relocation within sixty days of receiving the notice.²⁹⁷ A nonrelocating parent can seek a temporary or permanent injunction preventing the relocation of the child.²⁹⁸ Nonrelocating individuals as well as nonrelocating parents can also file motions to modify custody, parenting time, grandparent visitation or child support orders.²⁹⁹ If the nonrelocating parent fails to file a motion to temporarily or permanently enjoin the child's relocation within sixty days after his or her receipt of the notice, the relocating custodian may relocate.³⁰⁰

If the relocating parent meets the burden of proof to show relocation is made in good faith and for a legitimate reason, the burden shifts to the nonrelocating parent.³⁰¹ The person objecting to the relocation must show the court that the "proposed relocation is not in the best interest of the child";³⁰² that the notice "was not served in a timely manner" and that a parenting time agreement has not been presented; "that the child has been relocated without" appropriate notice or "an agreement between the parties" or an order of the court; or, "that there is a likelihood that, after final hearing, the court will not approve the relocation of the child."³⁰³ Pending a final hearing, the court may grant a temporary order permitting relocation if it finds that timely and appropriate notice was given; it

relocating individual intends to move; "[a] brief statement of the specific reasons for the proposed relocation of the child"; "[a] proposal for a revised schedule of parenting time or grandparent visitation with the child; a statement that a parent must file an objection to the relocation of the child with the court not later than sixty (60) days after receipt of the notice"; and, "[a] statement that a non-relocating individual may file a petition to modify custody order, parenting time order, grandparent visitation order or child support order." *See id.* § 31-17-2.2-3(a)(2).

294. The notice must be given "not later than ninety (90) days before the date that the relocating individual intends to move." *Id.* § 31-17-2.2-3(a)(1)(B). If the information cannot be provided at least ninety days before the intended move, the relocating individual must provide the information within ten days of obtaining it. *Id.* § 31-17-2.2-3(b). Regardless of the foregoing, "the relocating individual must provide all of the information required . . . not later than thirty (30) days the relocating individual intends to move the new residence." *Id.*

295. *Id.* §§ 31-17-2.2-1, -3.

296. *Id.* § 31-17-2.2-1.

297. *Id.* § 31-17-2.2-5.

298. *Id.* The objection must be made in good faith and for a legitimate reason. *Id.*

299. *Id.* § 31-17-2.2(1)(b).

300. *Id.* § 31-17-2.2-5(e). "On the request of either party, the court shall hold a full evidentiary hearing to grant or deny a relocation motion under subsection (a)." *Id.* § 31-17-2.2-5(b).

301. *Id.* § 31-17-2.2-5(d).

302. *Id.*

303. *Id.* § 31-17-2.2-6(a).

orders a revised schedule for temporary parenting time; and it finds “there is a likelihood that, after the final hearing, the court will approve the relocation of the child.”³⁰⁴ At the final hearing, the court will determine whether to allow the permanent relocation of the child after considering the relocation factors and whether the relocation is in the child’s best interests.³⁰⁵ Obviously, the greater the distance involved in the planned relocation, the more significant the threat to the continuity, quality, and pattern of interaction between the children and the parent left behind. Indiana’s relocation statute has finally officially recognized what trial courts and practitioners have always known in these highly emotional cases: the legitimacy of the reason for relocating and the motives for relocating and opposing the relocating are crucial.

V. PATERNITY

During the survey period, the Indiana legislature adopted several additions and changes to the paternity affidavit statute. These changes became effective as of July 1, 2006. Since the adoption of the new statute, fathers who sign a paternity affidavit after the birth of a child are now considered to be a child’s legal father without requiring further court proceedings.³⁰⁶ These fathers are also afforded reasonable parenting time with the child unless a court determines otherwise.³⁰⁷ Once sixty days have elapsed after the execution of a paternity affidavit, the affidavit may only be rescinded for two reasons.³⁰⁸ It can be rescinded if there is a showing that there was “fraud, duress, or material mistake of fact [during] the execution of the paternity affidavit” or if rescinder is requested by the man who signed the affidavit and only then if that man was

304. *Id.* § 31-17-2.2-6(b).

305. *Id.* § 31-17-2.2-6(c). The court will consider the following relocation factors:

- (1) The distance involved in the proposed change of residence.
- (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.
- (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
- (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual’s contact with the child.
- (5) The reasons provided by the
 - (A) relocating individual for seeking relocation; and
 - (B) nonrelocating parent for opposing the relocation of the child.
- (6) Other factors affecting the best interest of the child.

Id. § 31-17-2.2-1(b).

306. IND. CODE § 16-37-2-2.1(m) (Supp. 2006).

307. *Id.* § 16-37-2-2.1 (g)(2)(B).

308. *Id.* § 16-37-2-2.1(i).

excluded as the child's father after biological testing.³⁰⁹ A paternity affidavit may only be set aside if genetic testing excludes the man who signed the affidavit as the child's father.³¹⁰

The case of *In re Paternity of N.R.R.L.*³¹¹ focused primarily on civil procedure. It involved a paternity matter where the birth mother and her boyfriend, Rogge, executed a paternity affidavit soon after the child's birth.³¹² Almost two years later,³¹³ Milner filed a petition to establish paternity of the child naming the child's mother as the sole respondent.³¹⁴ The parties stipulated to genetic testing which proved Milner to be the child's biological father. Six months later, in April 2005,³¹⁵ Mother filed a motion to dismiss the paternity action filed by Milner. Rogge, the child's "legal father," filed a motion to intervene and later filed a notice of joinder in mother's motion to dismiss.³¹⁶ Milner, now the child's presumed father,³¹⁷ filed a motion to join Rogge. The motion to dismiss was denied, but Rogge's motion to join Rogge as a party was granted.³¹⁸ Rogge filed an interlocutory appeal contending the court erred when

309. *Id.* Fathers have sixty (60) days after execution of the affidavit to request the court to order genetic testing. *Id.* § 16-37-2.2.1(h).

310. *Id.* § 16-37-2.2.1(k).

311. 846 N.E.2d 1094 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 586 (Ind. 2006).

312. *Id.* at 1095. The paternity affidavit was executed pursuant to Indiana Code section 31-14-2-1.

313. The statute of limitations for filing a paternity action is two years. IND. CODE § 31-14-5-3 (2004). Note that Milner filed his petition just under one week before the statute would have run.

314. *In re Paternity of N.R.R.L.*, 846 N.E.2d at 1095.

315. The court states that Mother filed her motion in April, 2004, but upon preparing a timeline of facts, the author noticed a discrepancy in the dates. Counsel of record for the case was contacted and he confirmed the actual date of filing the motion was April 2005, the spring following Milner's petition.

316. *In re N.R.R.L.*, 846 N.E.2d at 1095.

317. IND. CODE § 31-14-7-1 (2004) provides:

A man is presumed to be a child's biological father if:

(1) the:

(A) man and the child's biological mother are or have been married to each other; and
(B) child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;

(2) the:

(A) man and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage:

(i) is void under IC 31-11-8-2, IC 31-11-8-3, IC 31-11-8-4, or IC 31-11-8-6; or

(ii) is voidable under IC 31-11-9; and

(B) child is born during the attempted marriage or not later than three hundred (300) days after the attempted marriage is terminated by death, annulment, or dissolution; or

(3) the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father.

318. *In re Paternity of N.R.R.L.*, 846 N.E.2d at 1095.

it denied the motion to dismiss.³¹⁹ Rogge argued the paternity action should have been dismissed because he “was a necessary party but was not named a party in that action.”³²⁰ The court of appeals found that he was indeed a necessary party as an adjudicated father; however, any error that resulted from Milner’s failure to add him was harmless as it was remedied when he was allowed to intervene in the action.³²¹ The court did not reach the issue of whether the genetic testing that established Milner as the biological father excluded Rogge as the child’s biological father,³²² it simply found that Milner did, in fact, have a claim upon which relief could be granted, and that the trial court did not err in denying Rogge’s motion to dismiss.³²³

VI. ADOPTION

A. *Standing to Participate in Proceedings*

*In re Adoption of J.B.S.*³²⁴ held that a party’s visitation privileges with a child through a guardianship do not guarantee standing to participate in adoption proceedings.³²⁵ Alfred Weidenhammer was married to J.B.S.’s grandmother.³²⁶ After the child’s mother, Strucker, was incarcerated, the couple were appointed guardians of the minor child and she began living with them. In December 2003, the child’s grandmother passed away.³²⁷ The child’s maternal aunt, Sorensen, petitioned the court to become the successor guardian for the child. The court denied her motion but gave her visitation privileges with the child.³²⁸ Weidenhammer filed a verified petition to adopt J.B.S. in August 2004, and the appropriate home studies were conducted.³²⁹ The court held a hearing on his

319. *Id.* The appellate court determined that although Rogge did not state it exactly, his motion to dismiss was essentially a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Indiana Trial Rule 12(B)(6) and the court treated it as such. *Id.*

320. *Id.* at 1096.

321. *Id.* The court compared the facts of this case to those in *In re Paternity of K.L.O.*, 816 N.E.2d 906 (Ind. Ct. App. 2004). In *K.L.O.*, the mother and her boyfriend executed a paternity affidavit as soon as the child was born. *Id.* at 907. The case is also similar because a different man, Larkins, later took a paternity test that confirmed his parentage of the child with a probability over of 99.99%. *Id.* Unlike this case, the legal father in *K.L.O.* was never a party to any of the paternity proceedings. *Id.* In *N.R.R.L.*, Rogge was allowed to intervene in the paternity action by Milner, therefore, any harm that arose out of Rogge not being named in the action was remedied. *In re Paternity of N.R.R.L.*, 846 N.E.2d at 1096.

322. *In re Paternity of N.R.R.L.*, 846 N.E.2d at 1097 n.3.

323. *Id.* at 1098.

324. 843 N.E.2d 975 (Ind. Ct. App. 2006).

325. *Id.* at 978.

326. *Id.* at 976.

327. *Id.*

328. *Id.* She was granted visitation two Thursdays and one Sunday a month. *Id.*

329. *Id.* The adoption report to the court recommended the granting of Weidenhammer’s

petition on November 22, 2004.³³⁰ The court entered a decree of adoption on December 17, 2004.³³¹ Sorensen filed a verified motion to set aside the adoption order on February 18, 2005.³³² The trial court agreed with Sorensen and set aside the decree of adoption stating that it had been procured by fraud.³³³ Weidenhammer appealed and the appellate court held that “[w]hile she had been granted the privilege to visit J.B.S. under the previous guardianship, Sorensen had no standing to participate in the adoption proceedings, and certainly no standing to object to those proceedings once final.”³³⁴ The case was remanded back to the trial court to revoke and set aside its order.³³⁵

B. Consent

A mother appealed the trial court’s decision to grant adoption of her child to the paternal grandparents arguing that she did not consent to the adoption in *In re Adoption of C.E.N.*³³⁶ C.E.N.’s paternal grandparents, Alfred and Lucy Stamper, were granted custody of him in October 2001.³³⁷ The child’s natural father consented to the adoption of C.E.N.³³⁸ However, his biological mother, Saulmon, would not consent to the adoption although she had admitted that she was “not in a position to have custody” of C.E.N.³³⁹ Saulmon did not make any effort to provide cash to support C.E.N.³⁴⁰ Furthermore, she failed “to exercise

petition. *Id.*

330. *Id.* Weidenhammer stated at the hearing that Sorensen had not exercised her visitation rights with the child since the summer of 2004. *Id.* The court later found that statement to be false. *Id.*

331. *Id.* at 977. The Decree granted Weidenhammer’s adoption of the child and terminated Stucker’s parental rights. *Id.* The Decree was later amended to reflect the correct spelling of J.B.S.’s name. *Id.* The amended decree is dated January 19, 2005. *Id.*

332. *Id.* Sorensen’s argument was based on the false testimony of Weidenhammer concerning her failure to exercise her visitation privileges with the child. *Id.*

333. *Id.* Although it has been indicated in caselaw that fraud may be one of the reasons a court can set aside an adoption, those cases involve situations where a particular person whose consent was required for the adoption was defrauded. *Id.* at 978 (citing *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1057 (Ind. 1992)). Here, the trial court did not need Sorensen’s consent before issuing the decree of adoption. *Id.*

334. *In re Adoption of J.B.S.*, 843 N.E.2d at 978. Standing is defined as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” BLACK’S LAW DICTIONARY 1442 (8th ed. 2004).

335. *Id.* at 979.

336. 847 N.E.2d 267, 271 (Ind. Ct. App. 2006).

337. *Id.* at 269. C.E.N. was born on August 2, 2000, and had been in the care and custody of his grandparents since the age of eight months old. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* The findings of fact from the trial court indicated that Saulmon contributed approximately \$125 to C.E.N. from October 2001 through November 2004. *Id.*

any substantial parenting time or communicate with C.E.N.” while he was with the Stampers.³⁴¹ Saulmon argued that her consent was required for the Stampers to adopt C.E.N.³⁴² The trial court followed Indiana Code section 31-19-9-8³⁴³ and held that because Saulmon failed “to communicate significantly with C.E.N.” without justifiable cause during the one year prior to the filing of the petition for adoption, her consent was not necessary.³⁴⁴ The appellate court agreed and held that the trial court “properly granted the Stampers’ petition for adoption of C.E.N.”³⁴⁵

341. *Id.* at 269-70. At one time, C.E.N. and Saulmon lived in the same apartment complex; yet Saulmon did not make any effort to visit with her child. *Id.* at 270. Saulmon visited C.E.N. for approximately ten minutes on Christmas day in 2003 and declined offers made by Lucy to arrange parenting time. *Id.*

342. *Id.* at 271. IND. CODE § 31-19-9-1 (2004) provides:

(a) Except as otherwise provided in this chapter, a petition to adopt a child who is less than eighteen (18) years of age may be granted only if written consent to adoption has been executed by the following:

- (1) Each living parent of a child born in wedlock.
- (2) The mother of a child born out of wedlock and the father of a child whose paternity has been established by:
 - (A) a court proceeding other than the adoption proceeding, except as provided in IC 31-14-20-2; or
 - (B) a paternity affidavit executed under IC 16-37-2-2.1;unless the putative father gives implied consent to the adoption under section 15 of this chapter.

343. In pertinent part, IND. CODE § 31-19-9-8 states:

- (a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:
 - (1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.
 - (2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent:
 - (A) fails without justifiable cause to communicate significantly with the child when able to do so; or
 - (B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

344. *In re Adoption of C.E.N.*, 847 N.E.2d at 271.

345. *Id.* at 272.

SURVEY OF RECENT DEVELOPMENTS IN HEALTH LAW

ICE MILLER LLP*

INTRODUCTION

This survey summarizes recent developments in case law, legislation, and administrative actions that affect the health care industry. Not meant to be an exhaustive review, this survey details the “hot” topics in the health care industry this survey year.¹

I. FRAUD AND ABUSE

A. *E-Prescribing and Electronic Health Records Safe Harbor Regulations*

The Medicare Modernization Act of 2003² directed the Secretary of Health and Human Services (“HHS”) to create exemptions from the Anti-kickback statute³ and Stark law,⁴ to permit certain entities to provide nonmonetary remuneration in the form of hardware, software, and information technology and training services, in connection with the transmission of electronic prescription information.⁵ On August 8, 2006, the Department of Health and Human Services (“HHS”) and Centers for Medicare and Medicaid Services (“CMS”) published final regulations which implemented the statutory requirement.⁶

* The following Ice Miller LLP attorneys contributed to the research and drafting of this article: Sarah Cotterill, Tami Earnhart, Lisa Gethers, Blaire Henley, Taryn Smith, Ann Stewart, Brad Williams, and Kevin Woodhouse.

1. October 1, 2005 to September 30, 2006.

2. Pub. L. No. 108-173, 117 Stat. 2066 (2003) (codified in scattered sections of 42 U.S.C. § 1395w-101 (2000)).

3. 42 U.S.C. § 1320a-7b(b) (2000). The Anti-kickback statute prohibits the knowing or willful offer, payment, solicitation or receipt of any remuneration in return for patient referrals, or the ordering or recommendation of an item or service, covered under a federal healthcare program. *Id.* The statute permits the Secretary to establish exceptions, known as “safe harbors,” for certain non-abusive practices which, if conditions are met, will not be treated as violations. *Id.* § 1320a-7b(b)(3)(E).

4. 42 U.S.C. § 1395nn (2000). The statute prohibits physician referrals of patients to an entity for certain “designated health services” if the physician has a financial relationship (including certain ownership, investment, or compensation arrangements) with the entity.

5. Medicare Prescription Drug, Improvement, and Modernization Act 2003, Pub. L. No. 108-173, § 1860D-4(e)(6), 117 Stat. 2066 (2003); 42 U.S.C. § 1395w-104(e)(6) (2000).

6. Medicare and State Care Programs: Fraud and Abuse; Safe Harbors for Certain Electronic Prescribing and Electronic Health Records Arrangements Under the Anti-kickback Statute, 71 Fed. Reg. 45,110 (Aug. 8, 2006) (Anti-kickback statute safe harbors), adding 42 C.F.R. § 1001.962(x) (2006); Medicare Program; Physicians Referrals to Health Care Entities with Which They Have Financial Relationships; Exceptions for Certain Electronic Prescribing and Electronic Health Records Arrangements, 71 Fed. Reg. 45,140 (Aug. 8, 2006) (Stark law exceptions), adding 42 C.F.R. § 411.357(v) (2006).

The new regulations actually go beyond the statutory mandate. In addition to the required exemptions for e-prescribing technology, the regulations also create a separate Stark law exception, and an Anti-kickback statute safe harbor, to encourage the adoption and use of “interoperable”⁷ Electronic Health Records⁸ (“EHR”) software, information technology, and training services.

The e-prescribing regulations require that the donation be nonmonetary, consisting of items or services in the form of hardware, software, or information technology services, which are necessary and are used solely to transmit and receive e-prescription information.⁹ The EHR regulations are similar, but provide that (1) only donations of software, information technology and training systems (not hardware) are protected, and (2) recipients must contribute fifteen percent of the donor’s cost.¹⁰

Under both regulations, donors may not take action to limit or restrict the compatibility of the items or services with other electronic prescribing or EHR systems.¹¹ Donors cannot restrict the use of the items or services for any patient without regard to payor status.¹² Recipients may not make the receipt of such items or services a condition of doing business with the donor.¹³ Donors may not condition eligibility for the items or services, or the amount or nature of the items or services, in a manner that takes into account the volume or value or referrals or other business generated.¹⁴ Donors may not provide items or services that the recipient already has. The arrangement must be in writing, signed by the parties, specify the items or services being provided and the donor’s cost, and cover all items or services provided by the donor.¹⁵

The EHR regulations expire on December 21, 2013, consistent with the

7. “Interoperable” is defined as “able to communicate and exchange data accurately, effectively, securely, and consistently with different information technology systems, software applications, and networks, in various settings[,] and exchange data such that the clinical or operational purpose and meaning of the data are preserved and unaltered.” 42 C.F.R. § 1001.952(y) (note) (2006); *id.* § 411.351.

8. “Electronic health record means a repository of consumer health status information in computer processable form used for clinical diagnosis and treatment for a broad array of clinical conditions.” *Id.* § 1001.952(x) (note); *id.* § 411.351.

9. Compare *id.* § 1001.952(x); *id.* § 411.351 (The “used solely” requirement means that e-prescribing hardware and software cannot include general office functions such as scheduling or billing.), with *id.* § 1001.952(y); *id.* § 411.351(w) (EHR technology need only be “used predominantly” to create, maintain, transmit, or receive electronic health records.).

10. *Id.* § 1001.952(y)(11); *id.* § 411.351(w)(4).

11. *Id.* § 1001.952(x), (y).

12. *Id.*

13. *Id.*

14. However, the EHR regulations permit donors to take into account the total number (but not the volume or value) of prescriptions written by the recipient. *Id.* § 1001.952(y)(5); *id.* § 411.357(w)(6).

15. *Id.* § 1001.952(x)(3)-(8); *id.* § 411.357(v)(3)-(8).

Administration's goal of adopting EHR technology by 2014.¹⁶

B. OIG Voluntary Disclosure Initiative

On April 24, 2006, Inspector General Daniel R. Levinson issued "An Open Letter to Health Care Providers."¹⁷ The letter announced a new initiative to promote the agency's 1998 Self-Disclosure Protocol,¹⁸ which could afford providers some relief from Civil Monetary Penalty ("CMP")¹⁹ liability under the physician self-referral and Anti-kickback statutes.²⁰

The 2006 letter leaves in place the standards concerning corporate integrity agreements ("CIAs") established by the Office of Inspector General ("OIG") in 2001.²¹ OIG will continue to settle appropriate overpayment cases by entering into less-onerous Certification of Compliance Agreements ("CCAs") which are shorter-lived and do not require costly monitoring by outside independent review organizations.

The 2006 initiative is limited to overpayments implicating the Stark law and Anti-kickback statute, which arise from hospital financial relationships with physicians. The principal benefit offered by the policy is reduced exposure to CMPs.²² The 2006 letter provides that, for providers participating in the Self Disclosure Protocol, OIG will generally settle CMP claims based upon a multiple of the value of the financial benefit conferred by the hospital by the physician, which is far less than the maximum possible penalty.²³

16. *Id.* § 1001.952(y)(13); *id.* § 411.357(w)(13); *see* Office of Inspector General, Message from the Inspector General (2006), <http://oig.hhs.gov/publications/docs/semiannual/2006/semiannual%20Final%20FY%202006.pdf> (discussing the 2014 goal).

17. Office of Inspector General, An Open Letter to Health Care Providers (Apr. 24, 2006), <http://oig.hhs.gov/fraud/docs/openletters/Open%20Letter%20to%20Providers%202006.pdf> [hereinafter 2006 Open Letter].

18. 63 Fed. Reg. 58,399 (Oct. 30, 1998). The Self Disclosure Protocol sets out a procedure for provider self-audit, reporting and repayment of alleged overpayments. The program was considered flawed because, among other things, (1) it required costly sampling and analysis to yield a statistically significant (ninety percent confidence level) result, (2) it offered no specific benefit in return for the disclosure, and (3) as an OIG policy, it did not affect the U.S. Department of Justice's prosecutorial discretion.

19. 42 U.S.C. § 1320a-7a (2000).

20. *See supra* notes 2-3.

21. Office of Inspector General, An Open Letter to Health Care Providers (Nov. 20, 2001), <http://oig.hhs.gov/fraud/docs/openletters/openletter111901.htm>.

22. 2006 Open Letter, *supra* note 17.

23. *Id.* OIG may impose a CMP on each claim for payment for a service rendered in violation of the Stark law of not more than \$15,000. 42 U.S.C. § 1395nn(g)(3) (2000). Each violation of the Anti-kickback statute is subject to a CMP of up to \$50,000, plus an assessment of up to three times the amount claimed for each item or service arising from the violation. 42 *Id.* § 1320a-7a(a). The OIG may also exclude violators from participation in federal health care programs. *Id.*

Providers participating in the program must give “full cooperation and complete disclosure of the facts and circumstances surrounding the violation.”²⁴ The degree of a provider’s cooperation will be considered in OIG’s determination whether to require a CMP.²⁵

As with earlier versions, the policy does not guarantee any particular benefit to a prospective participant. The policy does not bind the U.S. Department of Justice (“DOJ”). Indeed, before accepting a provider into the program, OIG will confer with DOJ to ensure that it is aware of each disclosure and has an opportunity to comment.²⁶

C. Mandatory False Claims Act Policies

Section 6032 of the Deficit Reduction Act of 2005²⁷ imposed new compliance obligations on large providers which became effective January 1, 2007. As of that date, states must amend their respective plans for medical assistance to include a requirement applicable to every entity that receives at least five million dollars annually in Medicaid payments. State plans must require that covered entities establish written policies that provide detailed information concerning the federal False Claims Act²⁸ and applicable state statutes providing civil or criminal penalties for false claims.

The required policies must cover, and be provided to, all contractors and agents of the entity, as well as the entity’s employees. Written policies must include measures for detecting waste, fraud and abuse, and set out the rights of employees to be protected as whistleblowers. Notwithstanding that the section title is “Employee Education About False Claims Recovery,”²⁹ the text of the section as passed does not mandate that employers provide actual training.

On December 13, 2006, CMS issued a letter to state Medicaid directors providing limited guidance.³⁰ The letter makes clear that the five million dollar threshold will be applied to entities as a whole, without regard to the number of locations providing service or the types of services provided. The letter does not clarify what is meant by the “detailed information” which written policies must include but states that CMS will not provide model language illustrating the required policies.³¹

Entities may disseminate written policies in paper or electronic form, so long as they are “readily available.” Although the section references employee

24. 2006 Open Letter, *supra* note 17.

25. *Id.*

26. *Id.*

27. Pub. L. 109-171, § 6032, 120 Stat. 4, 73-74 (codified at 42 U.S.C. § 1396a(a)(68) (2000)).

28. 31 U.S.C. § 3729 (scattered sections) (2000).

29. Pub. L. No. 109-17, § 6032, 120 Stat. 4, 73-74 (2005).

30. Letter from the Centers for Medicare & Medicaid Services to State Medicaid Directors, <http://www.cms.hhs.gov/smdl/downloads/SMD121306.pdf>.

31. *Id.*

handbooks, the letter provides that an entity need not create a handbook if none exists.

D. Indiana False Claims Act

Section 6031 of the Deficit Reduction Act³² provides financial incentives for states to enact false claims laws. States with acts meeting the federal requirements³³ qualify for a ten percent increase in the state's share of amounts recovered in a state action brought under the law. Indiana promptly adopted such a law in the 2005 legislative session,³⁴ as did several other states.

To qualify for the increased recovery, state laws, must among other things, preserve the *qui tam* provisions of the federal version,³⁵ and provide for civil penalties not less than the amount contained in the federal version. Approval of state laws rests with OIG.

In August 2006, after many states had already crafted relevant legislation, OIG published guidelines for evaluating whether state false claims laws meet the section 6031 requirements.³⁶ In December 2006, the Secretary rejected seven out of the ten newly-adopted state statutes submitted for approval, including Indiana's statute.³⁷ In a letter to Indiana authorities dated December 21,³⁸ the Secretary determined that Indiana's statute did not adequately mirror the federal version with respect to the definition of "knowing" conduct.³⁹ Indiana's statute failed because it applies to a person who acts "knowingly or intentionally," but does not define the term "knowingly" to include reckless conduct.⁴⁰

32. Pub. L. No. 109-171, § 6031, 120 Stat. 4, 72-73 (codified at 42 U.S.C. § 1396d (2000)).

33. 42 U.S.C. § 1396d(b).

34. IND. CODE § 5-11-5.5-1 (2005). For an analysis of the statute's provisions, see Ice Miller LLP, *Summary of Recent Developments in Health Law*, 39 IND. L. REV. 1051, 1069 (2006).

35. Individuals with evidence of prohibited conduct (referred to as "relators") may file a complaint on behalf of the United States against the alleged wrongdoer. The complaint is kept under seal for a period of at least sixty days and is not served on the defendant during that period. During the period the complaint is under seal, the government must investigate the claim and determine whether it will intervene in the action and thereafter control it. If the government declines to intervene, the relator may proceed with the action. 31 U.S.C. § 3730 (2000).

36. OIG's Guidelines for Evaluating State False Claims Acts, 71 Fed. Reg. 48,552 (Aug. 21, 2006).

37. *Few State Whistleblower Laws Meet Requirements for Incentive Bonus, OIG Finds*, 11 BNA HEALTH CARE FRAUD REPORT 8 (Jan. 3, 2007).

38. Letter from Daniel R. Levinson, Inspector General, to Allen K. Pope, Director, Indiana Medicaid Fraud Control Unit, <http://oig.hhs.gov/fraud/docs/falseclaimsact/Indiana.pdf>.

39. The federal False Claims Act provides that a person acts "knowingly" with respect to information if he "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b) (2000).

40. IND. CODE § 5-11-5.5-2 (2005). Such a definition of "knowingly" would not be consistent with Indiana's Model Penal Code-based general definition of the term. See IND. CODE § 35-41-2-2(b) (2004) ("A person engages in conduct 'knowingly' if, when he engages in the

The Secretary's disapproval does not interfere with enforcement of the Indiana statute, but will affect the State's share of recoveries in actions brought under it.

E. Nuclear Medicine as Designated Health Services Under Stark

On November 21, 2005, CMS issued a final rule which amends the definition of "designated health services" under the Stark law to include diagnostic nuclear medicine.⁴¹ In the final rule, CMS revised the definition of both "radiology and certain other imaging services" and "radiation therapy services and supplies" to remove the exclusionary language that had previously excluded diagnostic nuclear medicine from the definition of "designated health services."⁴² The final rule is effective January 1, 2007.

II. DEFICIT REDUCTION ACT OF 2005

On February 8, 2006, the President signed the Deficit Reduction Act of 2005 ("DRA").⁴³ The DRA is expected to slow the pace of spending in the Medicare and Medicaid programs by roughly \$40 billion. The DRA contains a number of provisions that will significantly affect Medicare and Medicaid reimbursement, some of which are summarized below.

A. Medicare Part A

1. Hospital Quality.—Section 5001(a) of the DRA expands a provision of the Medicare Modernization Act of 2003 ("MMA")⁴⁴ which ties Medicare inpatient hospital reimbursement to the hospital reporting certain quality data based on ten quality indicators.⁴⁵ The DRA provides that hospitals that do not report the quality data will have their payment update reduced by two percentage points beginning in fiscal year 2007.⁴⁶ The DRA also calls for the Secretary to expand the number of quality indicators that must be reported by hospitals.⁴⁷ The Secretary may replace or change quality measures as appropriate and all quality

conduct, he is aware of a high probability that he is doing so."). Recklessness constitutes a separate and distinct mental state ("plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct"). IND. CODE § 35-41-2-2(c) (2004). In order to conform to the federal requirement without undoing these provisions, the General Assembly would have to create a special definition of "knowingly" which is unique to the False Claims Act.

41. 70 Fed. Reg. 70,116, 70,283 (Nov. 21, 2005).

42. *Id.*

43. Pub. L. No. 109-171, 120 Stat. 4 (codified in scattered sections of 42 U.S.C.).

44. Pub. L. No. 108-173, 117 Stat. 2066 (2003).

45. Pub. L. No. 109-171, § 5001(a), 120 Stat. 4 (codified at 42 U.S.C. § 1396d (2000)).

46. 42 U.S.C. § 5001(a)(3)(viii)(I).

47. *Id.* § 5001(a)(3)(viii)(III).

data submitted under this requirement must be available to the public.⁴⁸

2. *Value-Based Purchasing Program*.—Section 5001(b) of the DRA also requires the Secretary to develop a plan to implement a “value-based” purchasing program for the inpatient prospective payment system (“IPPS”) payments to acute care hospitals.⁴⁹ The plan must consider: (1) the on-going development, selection, and modification process for measures of quality and efficiency in hospital inpatient settings; (2) the reporting, collection, and validation of quality data; (3) the structure of value-based payment adjustments, including the determination of thresholds or improvements in quality that would substantiate a payment adjustment, the size of the payment adjustment, and the sources of funding for the value-based purchasing payments; and (4) the disclosure of information on hospital performance.⁵⁰

3. *Gainsharing Demonstration Projects*.—Section 5007 of the DRA directs the Secretary to establish a gainsharing demonstration project.⁵¹ The gainsharing demonstration projects will “test and evaluate methodologies and arrangements between hospitals and physicians designed to govern the utilization of inpatient hospital resources and physician work to improve the quality and efficiency of care provided to Medicare beneficiaries and to develop improved operational and financial hospital performance with sharing of remuneration.”⁵² The gainsharing demonstration projects must arrange for remuneration as a share of savings, operate pursuant to a written plan agreement, include a patient notification process, monitor quality and efficiency of care, certify that elements of the program are subject to independent review, and contain referral limitations.⁵³ Previously, questions arose regarding whether gainsharing arrangements can be structured in compliance with the Anti-kickback statute,⁵⁴ the Stark Law,⁵⁵ and the Civil Money Penalty (“CMP”) provision which prohibits hospital payments to physicians which reduce or limit care.⁵⁶ The DRA, however, explicitly provides that gainsharing demonstration projects will not violate the Anti-kickback statute, the Stark Law or the CMP.⁵⁷

B. Medicare Part B

1. *Imaging Services*.—The Medicare Physician Fee Schedule update for calendar year 2006⁵⁸ contained a payment discount of the technical component

48. *Id.* § 5001(a)(3)(viii)(VI)-(VII).

49. *Id.* § 5001(b).

50. *Id.* § 5001(b)(2).

51. *Id.* § 5007.

52. *Id.* § 5007(a).

53. *Id.* § 5007(b)(1)-(6).

54. 42 U.S.C. § 1320a-7b(b) (2000).

55. *Id.* § 1395nn.

56. *Id.* § 1320a-7a(b).

57. Pub. L. No. 109-171, § 5007(c)(1), 120 Stat. at 34.

58. 70 Fed. Reg. 70,116, 70,216 (Nov. 21, 2005).

of certain multiple imaging procedures performed on contiguous body parts during a single visit. Under the payment discount, Medicare pays the full technical component for the most expensive imaging procedure and then applies a twenty-five percent discount to all other procedures performed during a single session for calendar year 2006.⁵⁹ The DRA exempted these reduced payment for multiple imaging procedures from the budget neutrality calculation.⁶⁰

The DRA also caps reimbursement for the technical component of certain imaging services payable under the Medicare Physician Fee Schedule to the payment amounts under the Medicare Hospital Outpatient Prospective Payment System.⁶¹ The payment cuts apply to “imaging and computer-assisted imaging services, including x-ray, ultrasound (including echo-cardiography), nuclear medicine (including positron emission tomography), magnetic resonance imaging, computing tomography, and fluoroscopy, but [will exclude] diagnostic and screening mammography.”⁶² The payment cuts are effective January 1, 2007.

2. *Limits on ASC Payments.*—Section 5103 of the DRA provides that payment rates for services performed in an ambulatory surgery centers may not exceed the payment rates for the same services performed in a hospital outpatient department under the Medicare Hospital Outpatient Prospective Payment System.⁶³ This provision is effective January 1, 2007 and until the Secretary establishes a revised payment system for ASCs.⁶⁴

3. *Physician Fee Schedule.*—Section 5104 of the DRA calls for a zero percent update to Medicare payments for physician services for calendar year 2006 instead of the proposed 4.4 percent reduction in payments for physician services by Medicare.⁶⁵

C. Medicare Parts A & B

Section 5201 of the DRA eliminates the payment update to the Medicare home health prospective payment rates for 2006.⁶⁶

59. *Id.* The Physician Fee Schedule for Calendar Year 2006 contained a provision that would have increased the twenty-five percent discount to a fifty percent discount in 2007. However, in the final Medicare Physician Fee Schedule Update for Calendar Year 2007, CMS maintained the twenty-five percent discount for 2007. 71 Fed. Reg. 69,659, 69,624 (Dec. 1, 2006).

60. Pub. L. No. 109-171, § 5102(a), 120 Stat. at 39. The exclusion of the multiple imaging procedure discount from the budget neutrality calculation means that any savings derived will not be counted in the pool of available funds for Medicare payments to physicians.

61. *Id.* § 5102(b), 120 Stat. at 39.

62. *Id.*

63. *Id.* § 5103, 120 Stat. at 39.

64. A revision of the payment system is called for in the MMA by January 2008. For discussion of the proposed rule, see *infra* Part III C.

65. Pub. L. No. 109-171 § 5104, 120 Stat. at 40-41.

66. *Id.* § 5201, 120 Stat. at 46.

D. Medicaid

Additionally, the DRA makes a number of significant changes to Medicaid reimbursement, specifically, to pharmacy reimbursement and Medicaid rebate programs.⁶⁷ The DRA also makes significant changes to the Medicaid asset transfer rules and eligibility provisions.⁶⁸ The DRA contains a number of Medicaid fraud and abuse provisions, discussed in Part I. Finally, the DRA contains a number of provisions which expand the ability of states to impose premiums and cost sharing requirements on Medicaid recipients, including cost sharing for prescription drugs and copayments for non-emergency care provided in the emergency room.⁶⁹

III. REIMBURSEMENT

In addition to the reimbursement changes in the DRA, there have been other significant changes in Medicare reimbursement.

A. Inpatient Prospective Payment System Changes

In an effort to better align payments for inpatient hospital services with costs of care and address concerns that the existing payment system encourages investment in specialty hospitals and “cherry picking” of more profitable cases, on August 1, 2006, CMS issued a final rule which significantly changes Medicare reimbursement in the Inpatient Prospective Payment System (“IPPS”) for fiscal year 2007.⁷⁰ The final rule assigns weights to DRGs based on hospital costs rather than charges, effective October 1, 2006.⁷¹ These changes will be phased in over a three year period. CMS also added twenty new DRGs to better reflect severity.⁷² Under the proposed rule, CMS proposed to adjust DRGs for patient severity. However, in the final rule, CMS announced that it would continue to study DRG classification options to adjust for patient severity with more comprehensive changes in 2008 following further evaluation and study by an outside contractor.⁷³

B. Long Term Acute Care Hospital Payment Changes

On May 12, 2006, CMS issued a final rule that changes the payment for long term acute care hospitals (“LTCHs”).⁷⁴ The final rule specified that there would

67. *Id.* § 6001-6003, 120 Stat. at 54-61.

68. *Id.* § 6011-6016, 120 Stat. at 61-67.

69. *Id.* § 6041-6044, 120 Stat. at 81-92.

70. Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2007 Rates, 71 Fed. Reg. 47,870 (Aug. 18, 2006) (to be codified at scattered sections of 42 C.F.R.).

71. *Id.*

72. *Id.*

73. *Id.*

74. Prospective Payment System for Long-Term Care Hospitals RY 2007, 71 Fed. Reg. 27,798 (May 12, 2006) (to be codified at 42 C.F.R. pt. 412).

be a zero percent update to LTCH payments for Rate Year (“RY”) 2007.⁷⁵ The new rule also revised the labor-related share of the LTCH prospective payment system federal rate to account for geographic differences in the area wage levels.⁷⁶

CMS also revised the payment adjustment formula for short stay outliers (“SSOs”). Previously, CMS adjusted payments for discharges “by the lesser of the 120 percent of the estimated cost of the case, 120 percent of the LTC-DRG specific per diem amount multiplied by the [length of stay] of that discharge, or the full LTC-DRG payment.”⁷⁷ Under the new final rule, CMS reduced the adjustment from 120% of the patient cost to 100% of the patient cost and added a fourth component to the “lesser of” list for payment adjustments: “a blend of the IPPS-comparable per diem payment amount (capped at the full IPPS comparable payment amount), and the 120 percent of the LTC-DRG per diem payment amount.”⁷⁸

The new rule also provides that Medicare will pay an additional amount for high cost cases.⁷⁹ CMS also eliminated the surgical DRG exception to the three day or less interrupted stay policy.⁸⁰ The three day or less interrupted stay policy provides that where a LTCH patient is discharged to an “acute care hospital, IRF, [skilled nursing facility (SNF)], or the patient’s home and [is] readmitted to the [long-term care hospital] within [three] days, Medicare makes only one LTCH PPS payment and does not provide for a separate payment for the services provided during the three day or less period.”⁸¹ The former rule contained an exception which allowed a separate payment to an acute care hospital in the event the treatment at the acute care hospital was for inpatient surgery.⁸² Under the new rule, CMS phased out this exception.

C. ASC Payment Changes

In the Medicare Modernization Act of 2003 (“MMA”), Congress directed CMS to develop and implement a new payment methodology for ambulatory surgery centers (“ASCs”) by January 1, 2008.⁸³ On August 8, 2006, CMS proposed a new payment system for ASCs that would base payments on the procedure classification and payment systems Medicare uses to pay hospitals for outpatient services.⁸⁴

75. *Id.* at 27,819.

76. *Id.* at 27,828.

77. *Id.* at 27,845.

78. *Id.* at 27,851.

79. *Id.* at 27,838.

80. *Id.* at 27,872.

81. *Id.*

82. *Id.*

83. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 626, 117 Stat. 2066, 2068 (2003).

84. *See generally* Hospital Outpatient Prospective Payment System and CY 2007 Payment

The proposed rule is intended to encourage quality, efficient care in the most appropriate outpatient setting given the rapid spending growth for services and the large variations in the use of services and to take needed steps to more logically align payment rates across payment systems to eliminate payment incentives favoring one care setting over another.⁸⁵

Under the new rule, CMS is proposing to pay ASCs 62 percent of the hospital payment for procedures performed in an ASC.⁸⁶ Additionally, CMS is changing how it determines what procedures it will reimburse when furnished in the ASC setting. Presently, CMS has an “inclusive” list of roughly 2500 procedures that it has approved for the ASC setting. Under the proposed rule, CMS would allow payment for procedures in an ASC setting, except those procedures that CMS determines are not appropriate or safe when performed in an ASC setting, thus creating an “exclusionary” list.⁸⁷ CMS has also, under the proposed rule, proposed to cap payment for “office-based” procedures to be the lesser of the Medicare physician fee schedule payment or the ASC rate under the new payment system.⁸⁸

IV. MEDICARE ENROLLMENT

On April 21, 2006, CMS published a final rule regarding provider and supplier enrollment requirements.⁸⁹ The new regulations set forth requirements for initial enrollment in the Medicare program and require providers and suppliers to update and report changes to certain information previously submitted on the enrollment application.⁹⁰ The final rule was effective June 20, 2006. In addition to the final rule, CMS has revised its Medicare Enrollment Application, specifically CMS Forms 855A, B, I, R, and S.⁹¹ The new Medicare Enrollment Applications must be used effective April 2006.

V. CLINICAL TRIALS

In 2006, the Centers for Medicare & Medicaid Services (“CMS”) announced that it is reconsidering its national coverage decision (“NCD”) on the Clinical

Rates, 71 Fed. Reg. 49,506 (Aug. 23, 2006) (codified at scattered parts of 42 C.F.R.).

85. CMS, Fact Sheets: Proposal for a Revised Payment System for Services Provided in Ambulatory Surgical Centers (Aug. 8, 2006), <http://www.cms.hhs.gov/media/press/factsheet.asp?Counter=1940>.

86. *Id.*

87. *Id.*

88. *Id.*

89. Requirements for Providers and Suppliers to Establish and Maintain Medicare Enrollment, 71 Fed. Reg. 20,754 (Apr. 21, 2006) (to be codified at scattered sections of 42 C.F.R.).

90. 42 C.F.R. § 424.500 (2006).

91. CMS, Enrollment Applications (Apr. 2007), http://www.cms.hhs.gov/MedicareProviderSupEnroll/03_EnrollmentApplications.asp.

Trial Policy,⁹² which describes the circumstances under which Medicare will cover certain items and services provided during the course of a clinical trial.

Previously, Medicare had not paid for items and services related to clinical trials because of their experimental nature. On July 10, 2006, however, CMS opened a reconsideration of its national coverage determination on clinical trials.⁹³ The purpose of the reconsideration is to further refine the policy, to rename it the Clinical Research Policy (“CRP”), to address several ambiguities, including the link between the CRP and the Coverage with Evidence Development concept, and the authority to allow Medicare to pay for the costs of limited investigational items.⁹⁴

The current Clinical Trial Policy was developed in response to a June 7, 2000, executive memorandum, issued by President Clinton, directing Medicare to pay for routine patient costs in certain clinical trials.⁹⁵ The 2000 Clinical Trial Policy, implemented September 19, 2000, requires trials to be “qualified” prior to payment of routine costs.⁹⁶ The policy also provides for certain trials to be deemed qualified; i.e., those that are approved and funded by a federal agency or have an IND approval from the FDA or are IND exempt.⁹⁷ An additional option, the self-certification option, was never implemented.

On October 27, 2006, CMS published in the Federal Register its Notice of the December 13, 2006 Medicare Coverage Advisory Committee (“MCAC”) meeting to consider issues associated with this NCD reconsideration.⁹⁸ Because CMS decided to convene an MCAC, it has not yet issued a proposed decision memorandum on the issue and expected completion date of the National Coverage Analysis (“NCA”) has been amended to July 9, 2007.

Specifically, CMS identified ten issues it intends to address as part of its reconsideration of the Clinical Trial Policy. These include the need to:

- (1) Clarify payment criteria for clinical costs in research studies other than clinical trials;
- (2) Devise a strategy to ensure that Medicare covered clinical studies are enrolled in the National Institute of Health (“NIH”) clinical trials registry website;^[99]
- (3) Develop criteria to assure that any Medicare covered clinical research study includes a representative

92. Meeting of the Medicare Coverage Advisory Committee, 71 Fed. Reg. 63,021 (Oct. 27, 2006).

93. OMS, Medicare Reuses Guidance for National Coverage Determinations with Evidence Development (July 12, 2006), <http://www.cms.hhs.gov/apps/media/press/release.asp?Counter=1897>.

94. *Id.*

95. See Medicare Clinical Trial Policies Overview, <http://www.cms.hhs.gov/ClinicalTrialPolicies/> (last visited June 10, 2007).

96. *Id.*

97. *Id.*

98. Meeting of the Medicare Coverage Advisory Committee, 71 Fed. Reg. 63,021 (Oct. 27, 2006).

99. See <http://www.clinicaltrials.gov> (last visited Apr. 5, 2007).

sample of Medicare beneficiaries, by demographic and clinical characteristics; (4) Clarify the definitions of routine clinical care costs and investigational costs in clinical research studies including clinical trials; (5) Remove the self-certification process that was never implemented; (6) Clarify the scientific and technical roles of Federal agencies in overseeing IND [investigational new drug] Exempt trials; (7) Determine if coverage of routine clinical care costs is warranted for studies beyond those covered by the current policy[;] (8) Clarify how items/services that do not meet the requirements of [Section] 1862(a)(1)(A) [of the Social Security Act¹⁰⁰] but are of potential benefit can be covered in clinical research studies . . .;^[101] (9) Clarify whether and under what conditions an item/service non-covered nationally may be covered in the context of clinical research to elucidate the impact of the item or service on health outcomes in Medicare beneficiaries; and (10) Discuss Medicare policy for payment of humanitarian use device (HUD) costs.¹⁰²

Although the current Clinical Trial Policy broadened the scope of Medicare payments and was instrumental in expanding access to clinical trials for Medicare beneficiaries, its general terms left substantial uncertainty in the research community regarding which costs are in fact eligible for reimbursement under Medicare. A CMS change to its current coverage policy will likely have a significant impact on manufacturers, providers, and patients with respect to coverage, reimbursement, billing, compliance, and patient access to new technology.

VI. PRICE TRANSPARENCY

On August 22, 2006, President George W. Bush signed an executive order which directs federal agencies that administer or sponsor a healthcare program to increase price and quality transparency by January 1, 2007.¹⁰³ The order directs federal agencies and their contractors to utilize, where available, health information technology systems and products so that health data can be easily shared.¹⁰⁴ The order also requires agencies to collect and share with beneficiaries information about prices paid to healthcare providers by insurers or health

100. Section 1862(a)(1)(A) of the Social Security Act requires that “reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.” 42 U.S.C. § 1395y(a)(1)(A) (2000).

101. Medicare has separately just released final guidance on “Coverage with Evidence Development” that includes provisions for coverage of items and services that may not meet the requirements of Section 1862(a)(1)(A) under “Coverage with Study Participation.”

102. MCAC Meetings, Clinical Trial Policy, <http://www.cms.hhs.gov/med/viewmcac.asp?where=index&mid=38>.

103. Exec. Order No. 13410, 71 Fed. Reg. 51,089 (Aug. 22, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/08/print/20060822-2.html>.

104. *Id.*

insurance plans for procedures performed along with the overall cost of services for common episodes of care and treatment of common chronic diseases.¹⁰⁵ The order also requires agencies to collect and share with beneficiaries information about the quality of services provided by doctors, hospitals, and other healthcare providers.¹⁰⁶ The President said the executive order is the “first step” in a larger plan to provide open health quality and price information and invited other employers to make similar commitments.¹⁰⁷

VII. EMTALA

Effective October 1, 2006, CMS revised hospital responsibilities under EMTALA.¹⁰⁸ First, the rule expands the type of health care professional who may certify false labor. Under the new rule,

[A] woman experiencing contractions is in true labor unless a physician, certified nurse-midwife, or other qualified medical person acting within his or her scope of practice as defined in hospital medical staff bylaws and State law, certifies that, after a reasonable time of observation, the woman is in false labor.¹⁰⁹

Hospitals, therefore, may revise their definition of “qualified medical personnel” to include certified nurse midwives and nurse practitioners.¹¹⁰

The rule also clarifies the application of EMTALA requirements to hospitals without dedicated emergency departments. Under 42 CFR § 489.24(b), only a hospital with a dedicated emergency department has an EMTALA responsibility with respect to an individual for whom no appropriate transfer is sought but who comes to the hospital seeking examination or treatment for a medical condition.¹¹¹ However, in recent years with the proliferation of specialty hospitals, there has been some confusion regarding EMTALA application to hospitals with specialized capabilities but who are without dedicated emergency departments. The final rule clarifies that hospitals with specialized capabilities¹¹² that do not have a dedicated emergency department are bound by the same responsibility to accept an appropriate transfer under EMTALA as hospitals with a dedicated emergency department.¹¹³

105. *Id.*

106. *Id.*

107. *Id.*

108. Changes to the Hospital Inpatient Prospective Payment Systems and CY 2007 Rates, 71 Fed. Reg. 47,870 (Aug. 18, 2006) (to be codified at scattered sections of 42 C.F.R.).

109. *Id.* (to be codified at 42 C.F.R. pt. 489.24(b)).

110. *Id.*

111. 42 C.F.R. § 489.24(b) (2006).

112. “Specialized capabilities” is defined in 42 C.F.R. § 489.24(f) (2006).

113. Changes to the Hospital Inpatient Prospective Payment Systems and CY 2007 Rates, 71 Fed. Reg. 47,870 (Aug. 18, 2006) (to be codified at 42 C.F.R. § 489.24). CMS noted, in the final rule, that this only clarified, it did not change, their position that EMTALA applies to hospitals with

VIII. MEDICAL STAFF CREDENTIALING AND PEER REVIEW

A. JCAHO Medical Staff Credentialing and Privileging Standards

The Joint Commission on Accreditation of Healthcare Organizations (“JCAHO”) issued proposed revisions to the Medical Staff Credentialing and Privileging Standards.¹¹⁴ The revisions amend the existing credentialing and privileging standards to ensure that the practitioner’s proficiency is assessed in the “six areas of ‘General Competencies’ adopted from the Accreditation Council for Graduate Medical Education (ACGME) and the American Board of Medical Specialties (ABMS) joint initiative.”¹¹⁵ The six “General Competencies” include patient care, medical knowledge, practice-based learning and improvement, interpersonal and communication skills, professionalism, and system-based practice.¹¹⁶ The major factors used to support the six General Competencies in the process of credentialing and privileging are “licensure, relevant training, experience, and current competence to perform the requested privilege.”¹¹⁷ The revised standards identify other reasonable criteria, which may be added by the organized medical staff, to include patient care, treatment and service skills expected in staff members with the applicant’s skills and training.¹¹⁸

Most significantly, the proposed revisions address three main areas through the imposition of six new standards: privilege-specific resource availability, performance monitoring, and continuous practice evaluation. First, the proposed revisions, as indicated in the introduction, recognize that privileges are setting-specific and therefore are based not only on an applicant’s qualifications, but should also be based on “the procedures and type of care, treatment and services that can be performed or provided within the proposed setting.”¹¹⁹ Under proposed Standard 1.0, the healthcare organization must have a mechanism to determine whether the resources necessary to support requested privileges are currently available, or will be available within a specified time frame.¹²⁰ The healthcare organization would have to “determine whether or not sufficient budgetary, spatial, equipment, and staffing resources are in place to support each requested privilege.”¹²¹

specialized capabilities that do not have a dedicated emergency department. *Id.*

114. Joint Commission on Accreditation of Healthcare Organizations, Proposed Revisions to the Medical Staff Credentialing and Privileging Standards (hereinafter “JCAHO Proposed Revisions”), *available at* www.abanet.org/health/05_health_links/News/2005-11_JCAHOCred-and-Priv.pdf (last visited June 9, 2007).

115. *Id.* at *1.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at *2.

120. *Id.*

121. *Id.*

Next, the proposed revisions contain a new section on “performance monitoring.”¹²² “Performance monitoring” allows a healthcare organization “to evaluate the privilege-specific competence of the practitioner who presents to the [healthcare entity] appropriately credentialed, but without an established record of competently performing the requested privilege at that facility” or evaluate currently privileged practitioners who are the subject of patient quality and safety concerns.¹²³ Under proposed Standard 4.0, hospitals are required to develop a performance monitoring process which would require, among others, criteria for evaluating the performance of applicants without a current performance record, criteria for evaluating the performance of applicants who are the subject of patient safety and quality concerns, triggers that indicate the need for performance monitoring, and the actions designed to resolve the performance issues.¹²⁴ Proposed Standard 5.0 would require hospital to develop an information review and analysis that is clearly defined and consistently applied for each requesting practitioner.¹²⁵ Proposed Standard 6.0 deals with the privilege decision notification and requires a defined process for notification of privileging decisions and appeal rights.¹²⁶

The theme of the proposed revisions is the continuous monitoring of a practitioner’s performance so that patient quality of care and safety issues are immediately and adequately addressed.¹²⁷ Proposed Standard 7.0 requires hospitals to factor continuous professional practice evaluation into the decision to maintain, revise, or revoke privileges.¹²⁸ The criteria used in this decision-making process “may include the review of operative and other clinical procedure(s) performed and their outcomes . . . ; pattern of blood use; requests for tests and procedures; length of stay pattern; mortality rates; risk management data; and the practitioner’s use of consultants, pharmaceuticals, and other treatment modalities.”¹²⁹ Proposed Standard 8.0 requires that a health care organization have “a clearly defined process for receiving, investigating, and addressing clinical practice concerns” and that reported concerns are uniformly investigated and addressed.¹³⁰

B. Peer Review

In 2006, a district court in Texas issued decisions in the *Poliner v. Texas Health Systems* case that dramatically altered the landscape of peer review.¹³¹ To

122. *Id.* at *9.

123. *Id.*

124. *Id.*

125. *Id.* at *11.

126. *Id.*

127. *Id.* at *12.

128. *Id.*

129. *Id.*

130. *Id.* at *13.

131. *Poliner v. Tex. Health Sys.*, No. Civ. A.3:00-CV-1007-P, 2006 WL 770425, at *1 (N.D.

fully understand the importance of this case, however, one must understand the prior decisions which made such a verdict possible.

Lawrence Poliner, M.D., along with his professional corporation, filed suit against Presbyterian Hospital in Dallas and several physicians in 2000, alleging the defendants “improperly and maliciously used the peer-review process to summarily suspend [his] privileges, thereby causing damage to his interventional cardiology practice.”¹³² Ultimately the case would turn on the decision of Dr. Knochel, the chairman of the Internal Medicine Department, to demand that Dr. Poliner agree to an abeyance of his privileges or face a summary suspension.¹³³

In 1998, several nurses completed incident reports concerning Dr. Poliner’s treatment of patients.¹³⁴ The reports concerned a patient who died following a cath procedure and another patient who suffered a stroke following a cath procedure.¹³⁵ A third nurse reported that Dr. Poliner had used a contaminated sheath.¹³⁶ These reports were then forwarded to the hospital’s Clinical Risk Review Committee.¹³⁷ While these reports were still under review, concerns arose regarding a fourth patient of Dr. Poliner.¹³⁸ The reviewing physician believed Dr. Poliner performed an angioplasty on the wrong artery, creating a life threatening situation for the patient.¹³⁹

In May, Dr. Knochel, along with Drs. Harper and Levin, met with Dr. Poliner. In that meeting, Dr. Knochel asked Dr. Poliner to agree to an abeyance of his cath lab privileges, pending the committee’s review of the four complaints.¹⁴⁰ Dr. Poliner alleged he received the letter at 2:00 p.m. and was told to sign the letter by 5:00 p.m. that day, or suffer an immediate suspension.¹⁴¹ Dr. Poliner signed the letter of abeyance, which would become the foundation of his breach of contract and defamation claims.

Dr. Knochel then created an ad hoc committee, which ultimately determined Dr. Poliner rendered substandard care in 29 of 44 reviewed cases.¹⁴² In June, the committee voted to recommend suspension of Dr. Poliner, who unsuccessfully appealed the determination via hospital channels. The case did not turn on a determination of whether Dr. Poliner rendered substandard care. Instead, the case

Tex. Mar. 27, 2006); *Poliner v. Tex. Health Sys.*, No. 3:00-CV-1007-P, 2006 WL 3342618 (N.D. Tex. Nov. 17, 2006) (slip opinion).

132. *Poliner v. Tex. Health Sys.*, No. Civ. A.3:00-CV-1007-P, 2006 WL 770425, at *1 (N.D. Tex. Mar. 27, 2006).

133. *Id.*

134. *Poliner v. Tex. Health Sys.*, No. Civ. A.3:00-CV-1007-P, 2003 WL 22255677, at *2 (N.D. Tex. Sept. 30, 2003).

135. *Id.*

136. *Id.* at *3.

137. *Id.* at *9.

138. *Id.* at *11.

139. *Id.* at *12.

140. *Id.*

141. *Id.* at *13.

142. *Id.* at *14.

turned on the procedure followed, or as it turned out not followed, in addressing the reports of substandard care. Thus, the court dismissed all defendants involved only in the June suspension and subsequent appeals, holding those defendants followed appropriate procedures and were entitled to immunity under the Health Care Quality Improvement Act ("HCQIA").¹⁴³

Prior to trial, the court dismissed all defendants but the hospital and Drs. Knochel, Harper, and Levin, as they were the only defendants involved in the abeyance letter.¹⁴⁴ Further, the court denied these defendants motions for summary judgment on the claims related to the abeyance letter as the defendants failed to meet the HCQIA requirements for immunity, holding the defendants failed to show that they took the action with the reasonable belief that they were furthering patient safety, that the action was taken after "a reasonable effort to obtain the facts," and that Dr. Poliner was afforded "adequate notice and hearing procedures."¹⁴⁵ The court also refused to grant summary judgment on statute of limitations grounds, despite the fact that the plaintiffs filed their claims more than one year after the defamatory publications were made.¹⁴⁶ Dr. Poliner claimed he could file suit after the statute of limitations ran because each publication of the summary suspension, for example on applications for hospital privileges, constituted an additional tort.¹⁴⁷ The court agreed and denied summary judgment as Dr. Poliner was able to show publication of the summary suspension within one year of filing suit.¹⁴⁸ Finally, the court refused to grant summary judgment on the contract claims, as Texas law stated hospital bylaws could create a contract for procedural rights between a physician and hospital.¹⁴⁹

The case was ultimately submitted to a jury, which awarded Dr. Poliner a total recovery of \$366,211,159.¹⁵⁰ Post-verdict, the court ordered the parties to mediate.¹⁵¹ The parties, however, were unable to come to an agreement and the court closed the mediation.¹⁵² The plaintiffs then moved to have the judgment entered.¹⁵³ In opposition to that motion, the defendants "renewed their motion for judgment notwithstanding the verdict."¹⁵⁴

The defendants challenged the jury's conclusion that the "[d]efendants were

143. *Id.*

144. *Id.* at *40.

145. *Id.* at *39.

146. *Id.* at *57-58.

147. *Id.* at *57.

148. *Id.* at *58.

149. *Id.* at *30 (granting summary judgment for all defendants on antitrust and deceptive trade practices claims).

150. *Poliner v. Tex. Health Sys.*, No. 3:00-CV-1007-P, 2006 WL 770425, at *2 (N.D. Tex. Mar. 27, 2006).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

not entitled to HCQIA immunity.”¹⁵⁵ The defendants alleged that no evidence supported the jury’s findings that the defendants summarily suspended Dr. Poliner without a reasonable belief that Dr. Poliner represented a danger to patient safety.¹⁵⁶ The defendants also took issue with the jury’s determination that the summary suspension was issued prior to adequate notice or an opportunity for a hearing.¹⁵⁷ In support of the jury’s verdict, the court pointed to testimony from Dr. Knochel indicating that he did not possess information, at the time of the abeyance, that Dr. Poliner posed a danger to his patients.¹⁵⁸ Further, Dr. Poliner’s experts testified “that no reasonable hospital could have taken the action it did against Dr. Poliner except by knowingly or recklessly disregarding the medical evidence.”¹⁵⁹ The court also noted Dr. Knochel did not offer Dr. Poliner a less severe option, instead requiring Dr. Poliner to agree to an abeyance or suffer a suspension of all privileges.¹⁶⁰ The court also found it important that the defendants refused to discuss the relevant patient cases with Dr. Poliner prior to the summary suspension and also focused on the evidence that Dr. Knochel told Dr. Poliner he was not permitted to consult an attorney.¹⁶¹ Thus, the court found a jury could reasonably conclude that the hospital did not have a reasonable belief that Dr. Poliner posed a danger to patients and the action was not taken after a “reasonable effort to obtain the facts of the matter.”¹⁶² The refusal to permit Dr. Poliner to consult with an attorney also supported a finding that the defendants failed to provide Dr. Poliner with adequate notice and hearing procedures. In sum, sufficient evidence existed for the jury’s determination that the defendants were not entitled to HCQIA immunity.¹⁶³ This same evidence supported the jury’s determination that the defendants were not entitled to immunity under state law.¹⁶⁴

The court also refused to overturn the breach of contract verdict, explaining that hospital bylaws created a contract entitling Dr. Poliner to certain procedural safeguards, which the defendants failed to provide.¹⁶⁵ In making this determination, the court again noted there was sufficient evidence to find Dr. Poliner did not agree to the abeyance but was instead forced to sign it under duress.¹⁶⁶ The same evidence that supported the denial of HCQIA immunity, namely the refusal to discuss the cases and Dr. Knochel’s testimony, supported

155. *Id.* at *4.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at *5.

163. *Id.*

164. *Id.*

165. *Id.* at *8.

166. *Id.*

the breach of contract claim.¹⁶⁷

The defendants also claimed they made no defamatory statements.¹⁶⁸ The court disagreed, explaining that the jury's finding that Dr. Poliner did not consent to the abeyance meant that Dr. Poliner was summarily suspended.¹⁶⁹ As the hospital bylaws stated the hospital could summarily suspend a physician who posed a danger to patients, the summary suspension amounted to a defamatory statement that Dr. Poliner was a dangerous physician.¹⁷⁰ Further, the jury found Dr. Poliner was not a dangerous physician, thus establishing the falsity of the statements.¹⁷¹ The defendants published the fact of the summary suspension to third parties, thus Dr. Poliner satisfied all elements of a defamation claim.¹⁷²

The defendants did successfully limit the plaintiffs' recovery by arguing the plaintiffs were entitled to only one recovery, under either the contract or tort theories.¹⁷³ The court held the plaintiffs were entitled to only one recovery because "[t]here was no evidence that the contract breach caused Dr. Poliner to suffer an injury to reputation/career and mental anguish separate and distinct from those caused by the tortious conduct."¹⁷⁴

After mediation proved unsuccessful, the court entered judgment.¹⁷⁵ Prior to entering judgment, the court first addressed the defendants' motion for a new trial and remitter. The court denied a motion for a new trial, as the jury verdict was not based on prejudice or bias. The court did, however, recognize that the verdict was excessive.¹⁷⁶ Ultimately, the court held Dr. Poliner could recover \$22.5 million on his defamation claim against the hospital and Dr. Knochel—Drs. Levin and Harper settled prior to the entry of judgment.¹⁷⁷ This included the following \$21 million in non-economic actual damages: \$6 million against Dr. Knochel for injury to career and reputation and \$6 million for mental anguish; \$4.5 million against the hospital for injury to career and reputation and \$4.5 million for mental anguish.¹⁷⁸ The damages also included \$7894.92 in lost earnings and approximately \$1,542,106 in punitive damages.¹⁷⁹ Finally, the judgment ordered that the defendants pay 8.35% interest on the compensatory damage award from the date the suit was filed to October 13, 2006, a period of over six years.¹⁸⁰

167. *Id.* at *12.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at *18.

174. *Id.*

175. As the plaintiffs were entitled to only one recovery, the court entered judgment on the defamation claim as the jury awarded the most damages under this theory. *Id.*

176. *Poliner v. Tex. Health Sys.*, 239 F.R.D. 468, 478 (N.D. Tex. 2006).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

Further, the defendants were required to pay post-judgment interest in the amount of 4.9% from October 14, 2006 to the date of satisfaction.¹⁸¹

This case not only provides a cautionary tale regarding the importance of adhering to the hospital's peer review procedures but also underscores the importance of the perceptions of the jury and judge. Shedding some light on the excessive verdict, the judge explained that while Dr. Poliner "presented himself as a committed and dedicated doctor who was good at and enjoyed his [job]," the "[d]efendants came across as arrogant, uncaring, and completely unconcerned with damaging Dr. Poliner's career."¹⁸² In fact, the court explained that:

[t]here is no doubt the jury awarded Dr. Poliner a tremendous amount of money in damages. The jury's attitude and award [were] influenced by Defendants' unwillingness to acknowledge their own wrongdoing and their callous attitude toward Dr. Poliner at the time of the abeyance/suspension and at trial. Defendants' insistence on taking the position that Dr. Poliner voluntarily agreed to the abeyance caused Defendants to lose credibility with the jury.¹⁸³

IX. LABOR AND EMPLOYMENT

A. *Exempt Status of Medical Coders and Respiratory Therapists* *Fair Labor Standards Act ("FLSA")*¹⁸⁴ *Opinion Letters 2005-35 and 2006-26*

The Department of Labor ("DOL") issued two opinion letters since last year's *Survey of Recent Developments in Health Law*¹⁸⁵ involving the exempt status of certain positions within the health care industry under the learned professional exemption.¹⁸⁶ FLSA Opinion Letter 2005-35¹⁸⁷ addressed the exempt status of medical coders and FLSA Opinion Letter 2006-26¹⁸⁸ addressed the exempt status of respiratory therapists. Both opinion letters concluded that the positions at issue were not exempt under the FLSA.¹⁸⁹

The focus of both of these opinion letters is the nature of the education required for the positions. In both letters, the DOL noted that the individuals holding the respective positions could possess either a bachelor's or an associate's

181. *Id.*

182. *Id.*

183. *Id.* at 476.

184. 29 U.S.C. § 201 (2000).

185. See generally Ice Miller LLP, *Survey of Recent Developments in Health Law*, 39 IND. L. REV. 1051 (2006).

186. 29 C.F.R. § 541.300(a) (2007).

187. U.S. Dep't of Labor, FLSA Opinion Letter 2005-35 (Oct. 3, 2005) [hereinafter FLSA Opinion Letter 2005-35].

188. U.S. Dep't of Labor, FLSA Opinion Letter 2006-26 (July 24, 2006) [hereinafter FLSA Opinion Letter 2006-26].

189. *Id.*

degree.¹⁹⁰ The DOL also noted that individuals wishing to hold the position of either medical coder or respiratory therapist do not need to possess a bachelor's degree to obtain the necessary state board certifications and/or licenses. Consequently, the DOL found that neither position required "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction."¹⁹¹

Importantly, the DOL emphasized that the requirements of the particular health care facility are not controlling. The relevant question is whether the "specialized academic training is a standard prerequisite for entrance into the profession."¹⁹² Accordingly, even though the hospital targeted respiratory therapists with bachelor's degrees in its hiring practices, the respiratory therapists did not fall under the learned professional exemption because the bachelor's degree was not a standard prerequisite for the profession as a whole.¹⁹³

B. Charge Nurses as Supervisors Under the National Labor Relations Act ("NLRA")

On September 29, 2006, the National Labor Relations Board ("the Board") set forth new guidelines for determining who is a "supervisor," and thus not entitled to union representation under the NLRA.¹⁹⁴ In *Oakwood Healthcare, Inc.*,¹⁹⁵ the Board announced the new guidelines and determined that permanent charge nurses at a Michigan hospital qualified as supervisors under the NLRA. However, in *Beverly Enterprises—Minnesota, Inc.*,¹⁹⁶ the Board applied these guidelines to determine that charge nurses at a nursing home in Minnesota were *not* supervisors.¹⁹⁷ Although the precise contours of the Board's new interpretation have yet to be determined, the guidelines arguably broaden the management-aligned category of "supervisor," and narrow the category of employees entitled to union representation.

The NLRA defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent

190. According to the DOL, only twelve percent of the accredited respiratory care programs in the country are at the baccalaureate level. FLSA Opinion Letter 2006-26.

191. 29 C.F.R. § 541.300(b)(4) (2007).

192. 29 C.F.R. § 541.301(d) (2007).

193. FLSA Opinion Letter 2006-26.

194. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 37 (2006), 2006 WL 2842124, at *19.

195. *Id.* at *19, *43.

196. 348 N.L.R.B. 39 (2006), 2006 WL 2842126, at *8.

197. *Id.* at *7.

judgment.¹⁹⁸

The U.S. Supreme Court has set forth a three-part test for determining supervisory status under this definition:

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions [in NLRA § 2(11)], (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.”¹⁹⁹

The Board issued the guidelines outlined in *Oakwood Healthcare* for determining who counts as a “supervisor” for purposes of the NLRA in response to the U.S. Supreme Court’s decision in *NLRB v. Kentucky River Community Care*,²⁰⁰ which rejected the Board’s assessment of whether certain nurses qualified as supervisors under the NLRA.²⁰¹

C. *The Oakwood Healthcare, Inc. Decision*

The bargaining unit in *Oakwood Healthcare* included 181 registered nurses who worked in a hospital. Of these 181 nurses, twelve were registered nurses who worked permanently as charge nurses. In addition, several other registered nurses rotated into the charge nurse position.²⁰² Charge nurses were responsible for overseeing their patient care units and assigning other registered nurses, licensed practical nurses, nursing assistants, technicians, and paramedics to patients. Charge nurses also monitored the patients in the unit, met with doctors and the patients’ family members, and followed up on “unusual incidents.”²⁰³ The petitioning union argued that all of the registered nurses—including the permanent and rotating charge nurses—were employees and not supervisors.²⁰⁴ The employer contended that both the permanent and rotating charge nurses were supervisors and should be excluded from the bargaining unit.²⁰⁵

Ultimately, the Board concluded that the permanent charge nurses, were “supervisors” for purposes of the NLRA.²⁰⁶ Before reaching this conclusion, the Board clarified (and broadened) its interpretation of some of the terms used in the NLRA to define supervisory authority: “assign,” “responsibly to direct,” and “independent judgment.”²⁰⁷

1. “Assign.”—“Assign” now extends beyond assignments of employees to

198. 29 U.S.C. § 152(11) (2000).

199. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001).

200. 532 U.S. 706 (2001).

201. *Id.* at 707.

202. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 37 (2006), 2006 WL 2842124 at *1-2.

203. *Id.* at *2.

204. *Id.*

205. *Id.*

206. *Id.* at *12.

207. *Id.* at *4-11.

job classifications, work sites, and work hours to include assignments of significant overall duties and tasks to employees.²⁰⁸ The Board held that the word “assign” refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee.”²⁰⁹ In addition, the Board noted that, in the health care setting, the term assign “encompasses the charge nurses’ responsibility to assign nurses and aids to particular patients.”²¹⁰

2. “*Responsibly to Direct.*”—Under *Oakwood Healthcare*, “responsibly to direct” applies not only to direction of entire departments but also to one-on-one task direction with authority to take corrective action. The Board now emphasizes accountability for the performance of the employees being directed.²¹¹ The Board stated that, “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ (as explained below) and carried out with independent judgment.”²¹² In addition, the Board held that the term “responsible” means that “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”²¹³

3. “*Independent Judgment.*”—Prior to *Oakwood Healthcare*, the Board took the position that “independent judgment” excluded “ordinary professional or technical judgment in directing less skilled employees to deliver services.”²¹⁴ However, the new decision holds that “independent judgment” can be exercised even if it is exercised using professional or technical expertise, shifting the focus from the kind of discretion to the degree of discretion.²¹⁵ To be “independent,” judgment must be “free of the control of others” and not “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”²¹⁶ With respect to charge nurses, the Board stated, “if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available personnel, the nurse’s assignment involves the exercise of independent judgment.”²¹⁷

4. *Application of Definitions.*—Applying these definitions to the nurses at

208. *Id.* at *4.

209. *Id.*

210. *Id.*

211. *Id.* at *7-8.

212. *Id.* at *7.

213. *Id.* at *8.

214. See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001).

215. *Oakwood Healthcare*, 2006 WL 2842124, at *8.

216. *Id.* at *9-10.

217. *Id.* at *10.

issue in *Oakwood Healthcare*, the Board concluded that the permanent charge nurses constituted “supervisors” for purposes of the NLRA.²¹⁸ The Board first held that the employer had not shown that the charge nurses exercised the supervisory function of “responsibly directing” other employees because it had not proved that the charge nurses were held accountable for the performance of the employees they directed.²¹⁹ However, it went on to hold that the employer had shown that the charge nurses exercised the supervisory “assigning” function and exercised “independent judgment” in making such assignments.²²⁰

Specifically, the Board held that the permanent charge nurses exercised the “assign” function when they assigned patients to nurses or assigned nurses to specific geographic locations within the hospital.²²¹ The Board also concluded that the permanent charge nurses performed this assignment with the exercise of “independent judgment” because the assignment involved was “based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients.”²²² Thus, the Board held, the permanent charge nurses were “supervisors” for purposes of the NLRA and should be excluded from the bargaining unit.²²³

D. *The Golden Crest Healthcare Decision*

A companion decision issued in conjunction with *Oakwood Healthcare* applied the new guidelines, confusing the issue of whether charge nurses are “supervisors” by finding in a fact-sensitive inquiry that not all charge nurses at a nursing home in Montana are supervisors for purposes of the NLRA.²²⁴ In *Golden Crest Healthcare*, the charge nurses occasionally asked certified nursing assistants (“CNAs”) to stay past the end of their shifts.²²⁵ They also oversaw the CNAs’ job performance, acted to correct the CNAs when they were not providing adequate patient care, and directed the CNAs to perform certain tasks.²²⁶

The Board concluded that the employer had not shown that the charge nurses

218. *Id.* at *12.

219. *Id.*

220. *Id.* at *12-17.

221. *Id.* at *13.

222. *Id.* at *16.

223. *Id.* at *17. With respect to the rotating charge nurses, the Board concluded that the employer had not proven that they exercised these supervisory functions with “regularity.” Thus, the rotating charge nurses did not devote a “substantial” part of their work time to supervisory tasks, as required by the NLRA. *Id.* at *18.

224. See *Beverly Enterprises-Minn. Inc. (Golden Crest Healthcare Ctr.)*, 348 N.L.R.B. 39 (2006), 2006 WL 2842126; see also *Croft Metals, Inc.*, 348 N.L.R.B. 38 (2006), 2006 WL 2842125, at *5-9 (applying the *Oakwood Healthcare* factors and holding that lead persons at an aluminum and vinyl products manufacturing plant in Mississippi were also employees, and not supervisors as defined by the NLRA).

225. *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. 39, 2006 WL 2842126, at *4.

226. *Id.* at *6.

exercised the supervisory functions of “assigning” or “responsibly directing.”²²⁷ First, the Board determined that the charge nurses did not actually have the authority to *require* the CNAs to stay past the end of their shifts.²²⁸ Second, the Board concluded that the charge nurses did not “responsibly” direct the CNAs because no evidence indicated that the charge nurses were held accountable for their performance in directing CNAs.²²⁹ Thus, the Board concluded, the charge nurses were *not* supervisors for purposes of the NLRA and could be included in the bargaining unit.²³⁰

E. Does Joint Employment Exist for Temporary Employees Under the Worker’s Compensation Act After Wishard Memorial Hospital v. Kerr?

In 2006, the Indiana Court of Appeals issued *Wishard Memorial Hospital v. Kerr*.²³¹ This decision makes practitioners question whether joint employers in the healthcare setting will be afforded the benefit of the exclusive remedy provision in the Indiana Worker’s Compensation Act²³² as the Legislature intended.²³³

Kerr was a registered nurse who was working at Wishard Memorial Hospital.²³⁴ Care Staff, Inc. hired Kerr and assigned her to work in Wishard hospital’s psychiatric emergency room. The staffing agreement between Care Staff and Wishard listed specific dates and times during a thirteen-week period in which Kerr was to work at Wishard.

On October 1, 2002, Kerr slipped and fell on a newly waxed floor as she left Wishard after completing her shift.²³⁵ Kerr applied for and received worker’s compensation benefits from Care Staff. She also filed a negligence complaint against Wishard and sought personal injury damages.²³⁶ Wishard filed a motion to dismiss based on lack of subject matter jurisdiction alleging that Kerr’s cause of action was barred by the exclusivity provision of the Indiana Worker’s Compensation Act because Kerr was Wishard’s employee.²³⁷ Under the statute, an injured employee is entitled to worker’s compensation benefits only, and may not sue the employer for damages.²³⁸

The trial court concluded that Wishard did not employ Kerr and, therefore,

227. *Id.* at *1.

228. *Id.* at *4-5.

229. *Id.* at *7.

230. *Id.* at *8.

231. *Wishard Mem’l Hosp. v. Kerr*, 846 N.E.2d 1083 (Ind. Ct. App. 2006).

232. IND. CODE § 22-3-2-2 (2004).

233. *Id.* § 22-3-6-1(a).

234. *Wishard Mem’l Hosp.*, 846 N.E.2d at 1086.

235. *Id.* at 1087.

236. *Id.*

237. *Id.*; IND. CODE § 22-3-2-2 (2004).

238. IND. CODE § 22-3-2-2.

that the Act did not bar her from bringing action against Wishard.²³⁹ Wishard appealed the decision. On appeal, the court recognized that the Indiana Worker's Compensation Act provides the exclusive remedy to an employee when he or she is injured by accident "arising out of and in the course and scope of employment."²⁴⁰ It also acknowledged that the Act contemplates that one employee may simultaneously have two employers.²⁴¹ The Indiana Court of Appeals acknowledged that joint employment is possible when both employers are in direct control of the employee and the employee is made accountable to both.²⁴² Nonetheless, it then went on to make the factual determination that an employment relationship did *not* exist between Kerr and Wishard.²⁴³

The court weighed seven factors in making its factual determination that Kerr was not an employee of Wishard. These factors, established by the Indiana Supreme Court in 1991, are (1) the right to discharge; (2) the mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries.²⁴⁴ These factors were weighed against each other as a part of a balancing test with the greatest weight given to the right to exercise control of the employee.²⁴⁵

The court analyzed and balanced each factor in great detail and determined that six of the seven factors were nearly evenly split, both for and against a finding of joint employment.²⁴⁶ The court determined that Wishard's right to discharge Kerr, the tools and equipment that Wishard supplied Kerr and her work boundaries weighed in favor of finding Kerr was Wishard's employee. The method of payment, the belief of the parties that an employment relationship existed, and the short length of employment weighed against finding joint employment. Since these six factors "cancelled" each other out, the court looked to the most important factor of control.²⁴⁷

The court ultimately determined that the evidence was neutral regarding whether Wishard "controlled" Kerr to the extent that she should be considered a Wishard employee.²⁴⁸ Because Kerr was in a highly skilled and trained profession, the court recognized that Wishard would have less ability to control and supervise the details of her job duties, but it found that Wishard's policies and procedures were no greater than the standards and skills required of any licensed registered nurse. In addition, although Wishard required Kerr to

239. *Wishard Mem'l Hosp.*, 846 N.E.2d at 1087.

240. *Id.* (citing IND. CODE § 22-3-2-6 (2004)).

241. *Id.* (citing IND. CODE § 22-3-3-31 (2004)).

242. *Id.* at 1088 (citing *Degussa Corp. v. Mullens*, 744 N.E.2d 407, 413 (Ind. 2001)).

243. *Id.* at 1094.

244. *Id.* at 1087-88 (citing *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991)).

245. *Id.* at 1090.

246. *Id.* at 1094.

247. *Id.*

248. *Id.* at 1092.

complete orientation and pass clinical skills testing specific to its work, these sessions were conducted by CareStaff rather than by Wishard.²⁴⁹

Finally, the court found Wishard failed to present evidence regarding the employment status of the physicians working in Wishard's psychiatric emergency room.²⁵⁰ The court reasoned that if the physicians directing Kerr's work were Wishard employees, rather than independent contractors, it would be sufficient to decide that Wishard was controlling Kerr's work. Because the court had no evidence about the physician's status, it found that Wishard failed to meet its burden of establishing that Kerr was its employee.²⁵¹ The court strictly construed the statute against limiting Kerr's right to bring suit and found that there was no joint employment entitling Wishard to the exclusivity remedy of the Act.²⁵²

In determining that no joint employment existed between Kerr and Wishard, the court acknowledged that "dual employment" issues in the worker's compensation context have generated inconsistent rulings from Indiana courts.²⁵³ Balancing seven different factors does not seem to lead to predictable results in these types of cases.²⁵⁴ This is precisely why the Legislature amended the Act in 2001. In fact, in 2005, the Indiana Court of Appeals heard a case with similar facts and affirmed the trial court ruling that dual employment existed.²⁵⁵ In the 2005 case, the court found that employees working for health facilities through a staffing agency were considered employees of *both* entities and subject to the exclusive remedies provision in the Worker's Compensation Act.²⁵⁶

The court's decision might have been different if it referred to the statutory provisions addressing joint employment. In 2001, the Legislature amended the definition section of the Act to clarify its intent and resolve any confusion regarding joint employment and exclusive remedy protection for both the lessor and the lessee of employees under the Act.²⁵⁷ Indiana Code section 22-3-6-1(a) states that "[b]oth a lessor and a lessee of employees shall each be considered joint employers of the employees provided by the lessor to the lessee . . ." for purposes of the exclusive remedy provision of the Act.²⁵⁸ It appears that no party before the court of appeals since the 2001 amendment has raised this statutory change to the court's attention. Consequently, despite the change in the law in 2001, which was designed to resolve the joint employment issue, courts continue

249. *Id.* at 1091.

250. *Id.*

251. *Id.* at 1092.

252. *Id.* at 1094.

253. *Id.* at 1088.

254. *Id.*

255. *See generally* *Jennings v. St. Vincent Hosp. & Health Care Ctr.*, 832 N.E.2d 1044 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1001 (Ind. 2006). It is interesting to note that the judge assigned to write the *Kerr* opinion was also the judge who dissented in *Jennings* which was the most recent case involving joint employment before the court of appeals.

256. *Id.* at 1054.

257. IND. CODE § 22-3-6-1(a) (2004).

258. *Id.*

to weigh the seven factors to determine whether an employment relationship exists, resulting in inconsistent decisions.²⁵⁹

X. ANTITRUST

On November 29, 2005, the Federal Trade Commission ("FTC") found that North Texas Specialty Physicians' ("NTSP") activities on behalf of its participating physicians amounted to an unlawful horizontal price-fixing conspiracy in violation of Section 1 of the Sherman Act.²⁶⁰

NTSP is an association of over 500 members consisting of independent physicians and physician groups in the Fort Worth, Texas area.²⁶¹ NTSP primarily negotiates and reviews payor contracts on behalf of its members. All but one of the payor contracts are non-risk-sharing, fee-for-service contracts. The challenged conduct in this case was the negotiation of the non-risk contracts.

The FTC began its analysis by acknowledging that *Arizona v. Maricopa County Medical Society*,²⁶² provides the basis for outright per se condemnation of conduct that parallels the conduct in issue. However, the FTC applied the "inherently suspect" analysis from *Polygram Holdings, Inc. v. FTC*.²⁶³ The FTC found that the *Polygram* analysis was appropriate because the U.S. Supreme Court has cautioned application of a per se standard to a professional setting where the economic impact is not immediately obvious and because physician networks have been found to have some procompetitive efficiencies.²⁶⁴ Under *Polygram*, a defendant can avoid condemnation of a suspect practice by offering justifications that are both "cognizable" under the antitrust laws and facially "plausible."²⁶⁵ Therefore, NTSP was required to advance a "cognizable" and "plausible" justification for the challenged conduct.²⁶⁶ NTSP was not able to do this. The FTC noted that had NTSP shown financial or clinical integration as described in *The Health Care Statements*,²⁶⁷ its conduct would have qualified for "rule of reason" analysis.

The FTC concluded that in the negotiation of its non-risk contracts NTSP

259. *Jennings*, 832 N.E.2d at 1044; see, e.g., *GKN v. Magness*, 744 N.E.2d 397 (Ind. 2001); *Degussa Corp. v. Mullens*, 744 N.E.2d 407 (Ind. 2001); *Turner v. Richmond Power & Light Co.*, 756 N.E.2d 547 (Ind. Ct. App. 2001); *Nowicki v. Cannon Steel Erection Co.*, 711 N.E.2d 536 (Ind. Ct. App. 1999).

260. *In re North Texas Specialty Physicians Corp.*, Docket No. 9312, Opinion of the Commission, at 3 (decision and order entered November 29, 2005), available at <http://www.ftc.gov/os/adjpro/d9312/index.htm> [hereinafter Opinion].

261. *Id.*

262. 457 U.S. 332, 356-57 (1982).

263. 416 F.3d 29 (D.C. Cir. 2005).

264. Opinion, *supra* note 260, at 11.

265. *Id.* at 13.

266. *Id.* at 13-14.

267. The FTC and Department of Justice Health Care Statements provide guidance about the agencies' enforcement intentions on issues that arise in the health care industry.

engaged in conduct designed to enhance the collective bargaining power of its members. The FTC found that this conduct included polling its member physicians on minimum acceptable reimbursement rates, reporting the results to its physicians, and using the results to calculate average minimum acceptable reimbursement rates which served as the basis for its minimum contract prices. The FTC found that the NTSP's use of a poll facilitated a price-fixing agreement among its members.²⁶⁸ NTSP's polling results essentially set a minimum fee schedule that intended to increase prices overall. NTSP also made the existence of the minimum fee schedule clear to the payors and informed them that NTSP would not enter into or forward any offers below the minimum.²⁶⁹

The FTC also looked at the physician participation agreement.²⁷⁰ The agreement required the physicians to forward any payor offers he/she received to NTSP, who had a right of first negotiation. Under the agreement, the physicians agreed that they would refrain from pursuing offers from a payor until they were notified by NTSP that it was discontinuing negotiations with the payor.²⁷¹ The FTC found that the agreement rendered NTSP the sole bargaining agent of NTSP competing physicians and thus facilitated price fixing among NTSP physicians.²⁷² The FTC found that NTSP rejected and did not deliver any non-risk contracts that fell below its minimum reimbursement schedule.²⁷³ The FTC also noted that the "terms of the [agreement] and the manner in which NTSP has utilized them hinder the ability of payors to assemble a marketable physician network in the Fort Worth area without submitting to the collective bargaining of NTSP."²⁷⁴

NTSP also had powers of attorney with most of its members which allowed NTSP to negotiate contracts on the member's behalf. The FTC found that NTSP used the powers of attorney in a manner similar to the agreement, which again allowed NTSP to solidify its power as a bargaining agent and thus facilitated price fixing.²⁷⁵

The FTC found that on several occasions NTSP used its agency powers to refuse to deal or to terminate member contracts. The FTC found that NTSP "illegally utilized refusals to deal and termination of contracts to enhance the bargaining power of the participating physicians and command higher prices."²⁷⁶

The FTC then looked at the justifications offered by NTSP. The FTC found that none met the cognizable and facially plausible test. First, NTSP argued that its risk panel physicians "use financial and clinical integration techniques to develop team-oriented improvements in cost and quality" and that NTSP has a right to "limit" its involvement to non-risk contracts so that their participation

268. Opinion, *supra* note 260, at 18.

269. *Id.*

270. *Id.* at 20.

271. *Id.*

272. *Id.* at 21.

273. *Id.*

274. *Id.*

275. *Id.* at 22.

276. *Id.* at 23.

will ensure the spillover of the efficient treatment patterns established in the risk contract.²⁷⁷ The FTC rejected NTSP's justification. NTSP also argued that its polling, communications with physicians and payors, and its refusal to messenger contracts had procompetitive effects on their own.²⁷⁸ The FTC rejected this argument noting that arguments to the effect that "competition itself is inefficient" are not cognizable under the antitrust laws.²⁷⁹

Ultimately, the FTC concluded that NTSP's challenged restraints constituted unlawful horizontal price-fixing. The FTC issued an order which requires that NTSP cease and desist from engaging in anticompetitive price-fixing conduct which includes

- (1) entering into, adhering to, participating in, maintaining, implementing, or otherwise facilitating any combination, conspiracy, agreement, or understanding on behalf of any physician with any payor;
- (2) to deal, refuse to deal, or threaten to refuse to deal with any payor;
- (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to price terms; or
- (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than [NTSP].²⁸⁰

XI. TAX

The IRS recently began a compliance initiative directed at tax-exempt hospitals reflecting the increasing concern of both the IRS and Congress as to whether tax-exempt hospitals provide sufficient "community benefit" to justify their tax exempt status.²⁸¹ The IRS requested that selected hospitals complete Form 13790, the Community Benefit Compliance Check Questionnaire ("Questionnaire"), which focused on the hospital's community benefit activities and policies.²⁸²

The Questionnaire presented over eighty questions including questions regarding the hospital's patient mix, emergency room issues, the structure and composition of the governing board of the hospital, medical staff privileges,

277. *Id.* at 28.

278. *Id.* at 31.

279. *Id.* at 31-32.

280. *Id.* at 4.

281. The community benefit standard is the standard under which hospitals receive their tax-exempt status under I.R.C. § 501(c)(3) (2006). The community benefit standard was adopted by the IRS in a 1969 revenue ruling (Rev. Rul. 69-545, 1969-2 C.B. 117). Additionally, in General Counsel Memorandum 39862 (Nov. 21, 1991) the IRS identified additional factors as evidence of community benefit.

282. The Questionnaire is available at <http://www.IRS.gov> (last visited June 9, 2007).

medical research issues, the extent of medical education and training at the hospital, the extent of uncompensated care, the hospital's billing practices, the provision of community programs, and the executive compensation practices of the hospital. Although the Questionnaire was "voluntary," hospitals that failed to complete the Questionnaire would be subject to further examination.²⁸³

283. Memorandum from George Quinn to the Wisconsin Hospital Association Executive, *IRS Compliance Questionnaire—A Sign of Things to Come?* (June 8, 2006), available at www.wha.org/communitybenefits/irsquestionnaire6-8-06.pdf.

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ*

During this survey period,¹ the Indiana appellate courts addressed a number of insurance issues in the fields of automobile, commercial, and homeowners coverage. This period focused upon unique coverage topics. This Article addresses the decisions in the past year and analyzes their effect upon the practice of insurance law.²

I. AUTOMOBILE CASES

A. *Passenger in Automobile Was Not “Using” Vehicle to Be Afforded Liability Coverage*

The decision of *Estate of Sullivan v. Allstate Insurance Co.*³ addressed an interesting question of whether a passenger of an automobile should be afforded liability coverage under an automobile insurance policy. Two insurance agents,

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1. The survey period for this Article is approximately November 1, 2005 to October 31, 2006.

2. Other cases during the survey period that are not addressed in this Article include *Casey v. Phelan Insurance Agency*, 431 F. Supp. 2d 888 (N.D. Ind. 2006) (holding that agency did not violate Indiana’s uninsured motorist statute by acquiring policy for insured that contained limits lower than liability limits); *Wolf Lake Terminals, Inc. v. Mutual Marine Insurance Co.*, 433 F. Supp. 2d 933 (N.D. Ind. 2005) (holding that environmental contamination claim satisfied definition of “personal injury” to support coverage under commercial general liability policy); *Lutz v. Erie Insurance Exchange*, 848 N.E.2d 675 (Ind. 2006) (finding that auto insurer has rights to pursue subrogation action in its own name); *Carter v. Property Owners Insurance Co.*, 846 N.E.2d 712 (Ind. Ct. App. 2006) (deciding that court could not rule as a matter of law that injured person was not an employee or independent contractor for application of “employee” exclusion under liability policy); *Perryman v. Motorist Mutual Insurance Co.*, 846 N.E.2d 683 (Ind. Ct. App. 2006) (holding that statute of limitations for insured’s breach of contract lawsuit began when insured discovered injury from coverage denial); *Matteson v. Citizens Insurance Co. of America*, 844 N.E.2d 188 (Ind. Ct. App. 2006) (treating tortfeasor as insured under liability policy so that insurer’s payment of proceeds to victim foreclosed victim’s underinsured motorist claim); *Walton v. First American Title Insurance Co.*, 844 N.E.2d 143 (Ind. Ct. App. 2006) (finding that insurer who refuses to defend insured for lawsuit, does at its own peril); *American Family Mutual Insurance Co. v. Ginther*, 843 N.E.2d 575 (Ind. Ct. App. 2006) (holding that liability insurer must pay post-judgment interest as part of compensation compensatory damage award); *Mid-American Fire & Casualty Co. v. Shoney’s, Inc.*, 843 N.E.2d 548 (Ind. Ct. App. 2006) (holding that insured landlord’s ownership of gas station was a “business pursuit” which excluded environmental claim); *In re Estate of Highfill*, 839 N.E.2d 218 (Ind. Ct. App. 2005) (construing disclaimer of coverage under life insurance policy), *trans. denied*, 860 N.E.2d 584 (Ind. 2006); *S.C. Nestel, Inc. v. Future Construction Co.*, 836 N.E.2d 445 (Ind. Ct. App. 2005) (finding that insurance company may not pursue subrogation claim against parties insured under policy).

3. 841 N.E.2d 1220 (Ind. Ct. App. 2006).

Robert and Alan, were returning from a sales call to a prospective insured.⁴ Robert was driving his personal automobile with Alan as a front seat passenger.⁵ Allegedly, Robert traveled into the path of another automobile being driven by the decedent plaintiff, who lost control and collided with a semi-tractor trailer.⁶ As a result of this collision, the decedent's estate brought a lawsuit against Robert, Alan, and others.⁷

Alan sought insurance coverage for the estate's lawsuit from his personal automobile insurer.⁸ That insurer provided a defense to Alan under a reservation of rights, and filed a separate declaratory judgment action to determine whether it owed liability insurance coverage to Alan for the estate's lawsuit.⁹ The policy provided coverage to Alan for "damages caused by his use of a 'non-owned auto,' which means 'an auto used by you.'"¹⁰ Thus, the issue of the declaratory judgment action was whether Alan, as a passenger, was "using" the automobile involved in the accident to be afforded insurance coverage.

The trial court granted the insurer's motion for summary judgment, finding that no coverage was owed.¹¹ The appellate court analyzed many Indiana decisions which addressed the meaning of "use" within an automobile liability policy,¹² and affirmed the granting of summary judgment.¹³ The court approved prior judicial decisions that interpreted "use" of an automobile for a liability policy as suggestive of "activity that assist[ed] in propelling or directing the vehicle to a place."¹⁴ The court also recognized that activities other than the actual driving of a vehicle can still involve an insured's "use" of an automobile for purposes of providing liability coverage, if the insured has an "active relationship" to the vehicle other than merely being a passenger.¹⁵

The appellate court concluded that Alan's sole relationship as a passenger in the accident vehicle, was insufficient to demonstrate that he was "using" the vehicle to be afforded insurance coverage.¹⁶ The court also rejected the insured's suggestion that evidence was designated that Alan provided directions to Robert

4. *Id.* at 1222.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *See id.* at 1223-25 (discussing *Monroe Guar. Ins. Co. v. Campos*, 582 N.E.2d 865 (Ind. Ct. App. 1991); *Am. Family Mut. Ins. Co. v. Nat'l Ins. Ass'n*, 577 N.E.2d 969 (Ind. Ct. App. 1991); *Miller v. Loman*, 518 N.E.2d 486 (Ind. Ct. App. 1987); *Protective Ins. Co. v. Coca-Cola Bottling Co.—Indianapolis, Inc.*, 467 N.E.2d 786 (Ind. Ct. App. 1984); *Challis v. Commercial Standard Ins. Co.*, 69 N.E.2d 178 (Ind. App. 1946)).

13. *Id.* at 1226.

14. *Id.* at 1223 (quoting *Protective Ins. Co.*, 467 N.E.2d at 790-91).

15. *Id.* at 1224 (citing *Monroe*, 582 N.E.2d 865).

16. *Id.* at 1225.

to create an inference that Alan was “using” the vehicle.¹⁷

This case is helpful in clarifying what is necessary for a passenger to be considered “using” a vehicle to be afforded coverage. This decision makes abundantly clear that merely being an occupant of a vehicle will not be sufficient to demonstrate “use” of a vehicle to trigger liability coverage.

B. Advanced Medical Payments by Liability Insurer Permitted to Be Setoff from Judgment Against Driver

The decision of *Crabtree v. Estate of Crabtree*,¹⁸ provides excellent analysis of the effect of a defendant driver’s liability insurer making advanced medical payments to the defendant’s vehicle occupants. Two children were passengers inside an automobile driven by their father that was involved in an accident.¹⁹ The father’s blood alcohol level was above the legal liability limit when the accident happened.²⁰ As a result of the accident, the children sustained personal injuries.²¹

Approximately a year after the accident, the father “died of causes unrelated to the accident.”²² The children brought a lawsuit against their father’s estate to recover “compensatory and punitive damages.”²³ Apparently, the children’s lawsuit alleged that their father’s conduct was “willful and wanton” in order to prevent the bar against the lawsuit by Indiana’s guest statute.²⁴ The estate successfully sought dismissal of the punitive damages claim, but the compensatory damage claim went to trial.²⁵ An award of \$11,500 was entered in favor of each child.²⁶ Upon the motion of the estate, the trial court reduced the children’s judgments by the amount that they received in medical payments coverage from their father’s insurer.²⁷

The children appealed both the trial court’s dismissal of the claim for punitive damages, as well as the trial court’s decision to reduce the judgment by the payment of medical expenses.²⁸ The court of appeals reversed both decisions.²⁹ This Article will not address the Indiana Supreme Court’s ruling on the trial court’s dismissal of the punitive damage claim, except to state that the supreme court ruled that “Indiana law does not permit recovery of punitive

17. *Id.* at 1226.

18. 837 N.E.2d 135 (Ind. 2005).

19. *Id.* at 136.

20. *Id.*

21. *Id.*

22. *Id.* at 137.

23. *Id.*

24. IND. CODE § 34-30-11-1 (2004).

25. *Crabtree*, 837 N.E.2d at 137.

26. *Id.*

27. *Id.*

28. *Id.*

29. *A.C. v. Estate of Crabtree*, 809 N.E.2d 433 (Ind. Ct. App.), *vacated*, *Crabtree v. Crabtree*, 822 N.E.2d 977 (Ind. 2004).

damages from the estate of a deceased tortfeasor.”³⁰ The court concluded that the primary purpose of punitive damages is to punish a wrongdoer and deter that wrongdoer from engaging in future misconduct.³¹ In the case of a deceased tortfeasor, the primary purpose of imposing punitive damages no longer existed.³²

The children argued that the trial court’s decision to allow a credit to the estate for medical payment benefits advanced by the vehicle’s insurer, was improper.³³ Specifically, the children contended that the insurer who advanced the medical payments was required to seek repayment of those benefits pursuant to Indiana’s subrogation statute.³⁴ The estate countered that the applicable statute was Indiana’s “advanced payment” statute:³⁵

If it is determined that the plaintiff is entitled to recover in an action described in section 1 of this chapter:

1. the defendant may introduce evidence of any advanced payment made; and
2. the court shall reduce the reward to the plaintiff to the extent that the award includes an amount paid by the advanced payment.³⁶

The court defined “advanced payments” to “include a payment made to the plaintiff by the defendant or the defendant’s insurance company.”³⁷ The court also observed that the purpose of the advanced payment statute was to prevent double recovery by the plaintiff if an advanced payment had been made.³⁸

The supreme court rejected the estate’s contention that the subrogation statute applied.³⁹ Because the subrogation statute required the subrogated insurer to pay a share of attorney fees and collection costs, the supreme court concluded that the legislature did not intend to compel an insurer to have to pay this proportionate share of its attorney fees while also insuring the defendant.⁴⁰ Because the insurer was both the medical payments insurer and the estate’s liability insurer, the insurance company would have to take a reduction pursuant to the subrogation act for payments it is making to itself.⁴¹ Instead, the supreme court concluded that the advanced payment statute properly addressed the issue.⁴²

30. *Crabtree*, 837 N.E.2d at 139.

31. *Id.*

32. *Id.*

33. *Id.* at 140.

34. *Id.* at 142 (citing IND. CODE § 34-53-1-2 (2004)).

35. *Id.* at 140 (citing IND. CODE § 34-44-2-3 (2004)).

36. *Id.*

37. *Id.* (quoting IND. CODE § 34-6-2-3 (2004)).

38. *Id.* (citing *Monroe v. Strecker*, 355 N.E.2d 418, 420 (Ind. App. 1976)).

39. *Id.* at 142.

40. *Id.*

41. *Id.*

42. *Id.*

This opinion is judicially sound in addressing a common occurrence where advanced medical payments have been made. An insurer should provide medical payments insurance to injured passengers, and maintain the ability to obtain a setoff for liability payments paid to the same passengers in resolution of a liability claim.

C. Self-Insured Employer Responsible to Indemnify and Defend Employee's Permissive Use of Vehicle Supplied by Employer

During the survey period, the Indiana Supreme Court delivered a very interesting decision addressing the obligations of self-insured entities providing vehicles to their employees in *Northern Indiana Public Service Co. v. Bloom*.⁴³ An electric utility supplied one of its employees with a truck to drive to and from work.⁴⁴ Under Indiana's Financial Responsibility Act,⁴⁵ the utility deposited sums totaling \$1 million to be considered a self-insured entity.⁴⁶

The employee was involved in an automobile accident while driving the truck causing his death and injuries to the other vehicle's driver.⁴⁷ The injured driver filed a personal injury lawsuit against the employee's estate and the utility.⁴⁸ The utility filed a counterclaim against the injured driver to recover property damage to its truck.⁴⁹ Additionally, the utility filed a cross-claim against the employee's estate seeking indemnification for any liability imposed on the utility because of the employee's driving of the utility's truck.⁵⁰ The estate cross-claimed against the utility, seeking an order requiring the utility to defend and indemnify the employee's estate for the claims of the injured driver.⁵¹

A number of summary judgment motions were eventually filed concerning these various claims. The more significant rulings focused upon the trial court granting summary judgment to the estate on its request for costs of defense and indemnity from the utility, and the denial of the utility's summary judgment motion seeking indemnification from the estate.⁵² The trial court further ordered the utility to pay for the estate's legal defense costs and to indemnify it for any judgment that could be entered against the estate up to the full extent of any excess liability insurance possessed by the utility.⁵³

The court of appeals affirmed the trial court's order requiring the utility to defend and indemnify the estate, but reversed the trial court's order, establishing the maximum liability of the utility at \$1 million, the amount made in deposits

43. 847 N.E.2d 175 (Ind. 2006).

44. *Id.* at 179.

45. IND. CODE §§ 9-25-1-1 to -9-7 (2004).

46. *N. Ind. Pub. Serv. Co.*, 847 N.E.2d at 179.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 179-80.

53. *Id.* at 180.

to the Bureau of Motor Vehicles.⁵⁴ On appeal to the Indiana Supreme Court, the utility conceded that it was responsible for the deceased employee's liability to the other driver, but contended that its liability was limited to the minimum amounts required under the Financial Responsibility Act, \$60,000.⁵⁵

The supreme court recognized that "[t]he purpose of the Financial Responsibility Act is to assure a source of compensation for victims harmed by the negligent operation of motor vehicles."⁵⁶ The court also observed that a party's election to be a self-insured entity only requires the party to afford the same amount of compensation to injured victims as what an entity with minimum limits under a liability policy possesses.⁵⁷ As a consequence, the supreme court concluded that self-insurers, such as the utility, must provide the minimum amount of security for potential liability as required of an entity who possesses a liability insurance policy.⁵⁸

With respect to the trial court's order requiring the utility to defend and indemnify its employee, the supreme court concluded that the Financial Responsibility Act does not transform a self-insured entity into a "quasi-insurance carrier and require it to indemnify a permissive user[,] such as its employee."⁵⁹ Instead, the purpose of the Act is to require the self-insured entity to provide protection to other drivers for injuries or damages arising from the use of the self-insured entity's vehicles.⁶⁰ As a result, its purpose was not to provide security to the permissive user for his potential liability, such that no duty to indemnify existed under the Financial Responsibility Act.⁶¹

However, the supreme court also created a duty for the self-insured entity to disclose to the permissive user that the self-insured utility's indemnity exposure was limited. The supreme court concluded that because the utility supplied the vehicle to the employee for use in employment and for personal use, the utility possessed a duty to disclose its limited indemnification obligation under the

54. *Id.* (citing 816 N.E.2d 887 (Ind. Ct. App. 2004), *trans. granted*, 831 N.E.2d 746 (Ind. 2005)).

55. *Id.* at 181. Indiana Code section 9-25-4-5 provides as follows:

[T]he minimum amounts of financial responsibility are as follows:

- (1) Subject to the limits set forth in subdivision (2), twenty-five thousand dollars (\$25,000) for bodily injury to or the death of one (1) individual.
- (2) Fifty thousand dollars (\$50,000) for bodily injury to or the death of two (2) or more individuals in any one (1) accident.
- (3) Ten thousand dollars (\$10,000) for damage to or destruction of property in one (1) accident.

IND. CODE § 9-25-4-5 (2004).

56. *N. Ind. Pub. Serv. Co.*, 847 N.E.2d at 182 (citing *Fed. Kemper Ins. Co. v. Brown*, 674 N.E.2d 1030, 1035 (Ind. Ct. App. 1997)).

57. *Id.*

58. *Id.* at 182-83.

59. *Id.* at 184.

60. *Id.*

61. *Id.* at 185.

Financial Responsibility Act.⁶² The court found that the utility should have made the employee aware of the significant risk exposure that existed, so that the employee could take necessary steps to try to secure appropriate insurance coverage.⁶³ If the utility failed to do so, the utility was barred from bringing any claims to seek reimbursement from the employee's estate for any obligation that the utility had above and beyond the self-insured limits.⁶⁴

This case presented some extremely interesting legal issues for the court to address. While the self-insured entity who complies with the mandates of the Indiana Financial Responsibility Act has limited financial obligations to the public, the court also wanted to insure that a permissive user of that self-insured entity's vehicle has the opportunity to acquire sufficient protection from other sources.

D. Insured's Failure to Give Examination Under Oath at Request of Insurer Constituted Breach of Policy as a Matter of Law

The decision in *Morris v. Economy Fire & Casualty Co.*⁶⁵ addressed the refusal of insured homeowners to provide examinations under oath as required under their policy.⁶⁶ The insureds refused to provide the examination under oath, until they received transcribed recorded statements that they gave to the insurer.⁶⁷ When the insurer refused to supply those transcribed statements, the insureds filed a complaint against the insurer alleging breach of the insurance contract and seeking damages for the insurer's alleged failure to deal with the insured in good faith.⁶⁸

The trial court granted the insurer's motion for summary judgment, finding that the insureds' failure to provide the examination under oath constituted a breach of the contract and excused the insurer from having to provide any coverage.⁶⁹ The court of appeals reversed the trial court.⁷⁰

The Indiana Supreme Court granted transfer, and affirmed the trial court's grant of summary judgment to the insurer.⁷¹ The supreme court rejected the insureds' contention that they were entitled to receive the transcribed statements before having to give the examination under oath.⁷² Instead, the supreme court

62. *Id.* at 188.

63. *Id.*

64. *Id.*

65. 848 N.E.2d 663 (Ind. 2006).

66. In a section titled "Your Duties After Loss," the policy provided: "[i]n case of a loss to covered property, you must see that the following are done: . . . (f) as often as we reasonably require: . . . (3) submit to examination under oath, while not in the presence of any other insured, and sign the same." *Id.* at 666.

67. *Id.* at 665.

68. *Id.*

69. *Id.*

70. *Id.* (citing *Morris v. Econ. Fire & Cas. Co.*, 850 N.E.2d 129 (Ind. Ct. App. 2004)).

71. *Id.*

72. *Id.* at 666.

found that the policy required the insureds to give the examinations at the request of the insurer, and there were no policy provisions which allowed the insureds to refuse to do so until they received documents from the insurer.⁷³ By refusing to submit to the examination, the court found, as a matter of law, that the insureds breached the policy.⁷⁴ Consequently, the insurer did not have to provide insurance coverage under the homeowners policy.⁷⁵

This decision firmly establishes that the policy requirement that an insured submit to an examination under oath at the request of the insurer is a policy condition that must be satisfied in order for the insured to be entitled to coverage. Furthermore, because the examination under oath affords the insurer a valuable tool in detecting and addressing potential insurance fraud, the court's refusal to require the insurer to supply the insured's transcribed statements benefits the insurer in addressing potential insurance fraud claims.⁷⁶

E. In Addressing Claims of Multiple Passengers to Underinsured Motorist Benefits to Determine if Tortfeasor Was an "Underinsured Motorist," Insurer Should Compare Policy Limits Between Tortfeasor's Liability Policy and Underinsured Motorist Coverage Policy

The decision of *Grange Insurance Co. v. Graham*⁷⁷ addresses a commonly occurring situation. Graham was driving a vehicle that was insured by an automobile policy with underinsured motorist coverage limits of \$100,000 per person and \$300,000 per accident.⁷⁸ Inside Grange's vehicle were four other passengers.⁷⁹ Graham collided with a vehicle being driven by Hildenbrandt, who was insured by an automobile policy that had liability limits of \$100,000 per person and \$300,000 per accident.⁸⁰

The accident resulted in serious injuries to Graham and the other occupants of her automobile.⁸¹ Because their damages appeared to exceed the per accident policy limits of Hildenbrandt's policy, the liability limits were divided among the occupants of Graham's vehicle, with each of them receiving less damages than what they believed their claims were worth, and also less than the per person limits of the policy (\$100,000).⁸² Each occupant of Graham's vehicle sought to recover underinsured motorist coverage under the policy covering the vehicle in

73. *Id.*

74. *Id.* at 666-67.

75. *Id.*

76. The insurer obviously does not wish to supply an insured with previously recorded statements because of the insured's description or "story" of the incident changes, this is significant evidence of potential fraud by the insured.

77. 843 N.E.2d 597 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 589 (Ind. 2006).

78. *Id.* at 598.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

which they were riding.⁸³ The underinsured motorist carrier contended that because the tortfeasor's policy had identical per person and per accident limits as the underinsured motorist policy, no additional coverage was available.⁸⁴

A declaratory judgment lawsuit was filed.⁸⁵ The trial court denied the insurer's motion for summary judgment, and granted summary judgment in favor of the claimants.⁸⁶ The court concluded that because the claimants had received less than the per person limits for underinsured motorist coverage, they were entitled to seek additional amounts up to the per person limits of the underinsured motorist coverage.⁸⁷

On appeal, the court observed that each party presented a previous Indiana appellate decision which supported their respective positions.⁸⁸ While the court found each of these cases instructive, they did not directly address the issue before the court.⁸⁹ Instead, the court looked to the guiding purpose of uninsured/underinsured motorist coverage, to place "the insured in the position he would have occupied if the tortfeasor had liability coverage equal to [the insured's] underinsured motorist limits."⁹⁰ The court found that a comparison of the limits of coverage available under the tortfeasor's policy and the underinsured motorist policy (\$300,000 per occurrence) were identical because the goal was to provide the claimants with the same coverage as if their own underinsured motorist policy applied.⁹¹ Consequently, the court concluded that the tortfeasor was not an "underinsured motorist"; therefore, the claimants could not obtain additional recovery.⁹²

At first glance, it appears that the *Grange* decision is a departure from the Indiana Supreme Court's decision in *Corr v. American Family Insurance*.⁹³ In

83. *Id.* at 599.

84. *Id.* Surprisingly, the court did not appear to provide the definition of "underinsured motorist" within the policy. The policy included language of what the insurer owed as follows:

[t]he maximum we will pay under this coverage is the lesser of: (1) the difference between; (a) the amount paid in damages to the insured by or for any person or organization who may be liable for the insured's bodily injury; and (b) the per person limit of coverage provided in this policy; or (2) the difference between; (a) the total amount of damages incurred by the insured; and (b) the amount paid by or for any person or organization for the uninsured's bodily injury.

Id. at 598-99.

85. *Id.* at 599.

86. *Id.*

87. *Id.* at 599.

88. *Id.* at 600. The insurer cited *Allstate Insurance Co. v. Sanders*, 644 N.E.2d 884 (Ind. Ct. App. 1994), while the claimants referred to *Corr v. American Family Insurance*, 767 N.E.2d 535 (Ind. 2002).

89. *Grange*, 843 N.E.2d at 600.

90. *Id.* at 601 (quoting *Allstate*, 644 N.E.2d at 887).

91. *Id.* at 602.

92. *Id.*

93. 767 N.E.2d 535, 537 (Ind. 2002).

Corr, several parties were injured by a tortfeasor which resulted in a division of that tortfeasor's limits to the multiple injured victims; however, the underinsured motorist claim at issue was presented by only one of the claimants and that claimant was seeking coverage under his own policy. The supreme court ultimately "determined that the tortfeasor's vehicle *was* underinsured because the insureds' policies provided underinsured limits that exceeded the amount paid [to the claimant] by the tortfeasor."⁹⁴ Thus, because the claimant in *Corr* received less than the per person limit and was the only claimant to the underinsured motorist policy, the supreme court found that the claimant could seek the difference between what was paid and the per person limit of his policy.⁹⁵

Another decision on this issue decided during this survey period is *Progressive Insurance Co. v. Bullock*.⁹⁶ *Bullock* involved a situation where multiple claimants received a distribution from a tortfeasor's policy, and sought coverage under their underinsured motorist policy. The *Bullock* case, decided before the *Graham* decision, is factually complicated; however, one of the conclusions in *Bullock* is a rejection of the *Graham* court's determination that a comparison of the per person limits between the liability and underinsured motorist policies should be used to define an underinsured motorist.⁹⁷ Instead, the *Bullock* decision followed the analysis of an earlier court decision on this issue.⁹⁸

If the goal is to provide an insured with compensation of at least what that insured could recover from the tortfeasor, then the *Corr* analysis is more appropriate. In other words, if the insured does not receive the per person limits from the tortfeasor, then the insured should be able to recover that figure from any applicable underinsured motorist policy. The court in *Grange* rejected that approach, and suggests a comparison of the per person limits, while the *Bullock* case appears to hold the opposite conclusion.

F. Policy That Required Suit Against Insurer for Underinsured Motorist Benefits Within Personal Injury Statute of Limitations Ruled Ambiguous

The analysis in *Clevenger v. Progressive Northwestern Insurance Co.*⁹⁹ focused on whether an insured's lawsuit against his insurer for underinsured motorist coverage was barred. The insured sustained personal injuries as a result of an automobile accident with another driver.¹⁰⁰ The insured's counsel submitted a claim on behalf of the insured for medical benefits coverage for medical expenses incurred by the insured, and the insurer paid the medical

94. *Grange*, 843 N.E.2d at 600.

95. *Id.* at 601 (citing *Corr v. Shultz*, 767 N.E.2d 541 (Ind. 2002)).

96. 841 N.E.2d 238 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 589 (Ind. 2006).

97. *Id.* at 243-44.

98. *Id.*

99. 838 N.E.2d 1111 (Ind. Ct. App. 2005).

100. *Id.* at 1113.

bills.¹⁰¹

The insurer informed its insured and the other driver's counsel of its subrogation rights for payment of the medical bills.¹⁰² The insured completed her treatment, and her litigation against the other driver continued;¹⁰³ however, approximately one month before the expiration of the two-year statute of limitations for personal injury claims,¹⁰⁴ the insured resumed treatment, which eventually required a surgery greatly increasing her medical expenses.¹⁰⁵

As a result of this new medical treatment, the other driver's insurer agreed to exchange its full policy limits in settlement of the case.¹⁰⁶ The insured notified her underinsured motorist insurer that she intended to pursue a claim for coverage under the underinsured motorist section of the policy.¹⁰⁷ After more than two years had passed from the date of the accident, the insurer filed a declaratory judgment action claiming that the insured's claim for underinsured motorist benefits was untimely because it was after the expiration of what would be the two-year bodily injury statute of limitations.¹⁰⁸ The insurer contended that because no action was filed against it for underinsured motorist coverage within the two-year bodily injury statute of limitations, the insured's claim was time-barred.¹⁰⁹

In response, the insured argued that other policy provisions prevented her from filing a lawsuit against the insurer.¹¹⁰ Specifically, the insured argued that until she received the full policy limits of the other driver, she had no underinsured motorist claim to pursue, and could not file a lawsuit against the insurer.¹¹¹

The court found that the provision relied upon by the insurer was ambiguous.¹¹² The court first observed that there was no reference within the policy to a specific time when the statute of limitations would be triggered.¹¹³ Reading together the insurer's policy language that restricted the insured's ability to bring suit against the insurer and the language requiring that the insured exhaust all coverage with any potential tortfeasors before presenting a claim, the

101. *Id.*

102. *Id.*

103. *Id.*

104. IND. CODE § 34-11-2-4 (2004).

105. *Clevenger*, 838 N.E.2d at 1113.

106. *Id.* at 1113-14.

107. *Id.* at 1114.

108. The applicable insurance policy language provided: "We may not be sued unless there is full compliance with all terms of this policy. Any lawsuit against us by you . . . must be commenced within the time period set forth as the bodily injury statute of limitations in the laws of the state listed in our records as your principal address." *Id.* at 1115.

109. *Id.*

110. *Id.* at 1115-16.

111. *Id.* at 1116.

112. *Id.*

113. *Id.* at 1117.

court found the policy ambiguous.¹¹⁴ As a consequence, the court refused to grant summary judgment to the insurer.¹¹⁵

Although the policy language appeared to be clear in requiring that claims against the underinsured motorist carrier be instituted within the two-year statute limitations period for personal injury, this decision is sound because the insured was not aware of her right to pursue an underinsured motorist claim until after that two-year period of time had expired. To prevent the insured from asserting an underinsured motorist claim in this instance would be a harsh result.

G. Court Finds Ambiguity in Uninsured Motorist Policy's Requirement That Uninsured Motorist Be "Identified"

If an insurance policy requires that the other driver of an accident be "identified," how specific in the identity does the insured need to be? That was the issue addressed in *Gillespie v. Geico General Insurance Co.*¹¹⁶ The insured was driving along the highway when a "white Honda" automobile being driven by a Caucasian woman spun and came to rest in the middle of the highway.¹¹⁷ In an effort to avoid the white Honda, the insured also lost control, and collided with a median wall along the highway.¹¹⁸ The driver of the white Honda left the accident scene, and no one was able to identify her by name.¹¹⁹ The insured sought uninsured motorist coverage from his carrier; however, the carrier denied the claim by contending that the white Honda was not an "uninsured auto" as required under the policy.¹²⁰ The policy restricted the definition of "uninsured auto" to exclude "a vehicle whose owner or operator cannot be identified."¹²¹

The trial court granted the insurer's motion for summary judgment by finding that the language of the policy was unambiguous.¹²² On appeal, the court noted that the insurer did not define "identified."¹²³ When the court looked at dictionary definitions of "identify," it found that the insured's ability to describe the other car as a white Honda, and the driver as a Caucasian woman, was sufficient to satisfy the meaning of "identify."¹²⁴ Consequently, the court construed the policy against the insurer and noted that the insurer could have drafted the policy to require certain information to meet its definition of "identify."¹²⁵

Certainly, it was the intent of the insurer to be able to learn the name of the

114. *Id.* at 1117-18.

115. *Id.* at 1118.

116. 850 N.E.2d 913 (Ind. Ct. App. 2006).

117. *Id.* at 915-17.

118. *Id.* at 915.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 916.

123. *Id.* at 918.

124. *Id.*

125. *Id.*

other driver in order to seek recovery for any benefits paid to its insured.¹²⁶ However, because it did not define “identify” to require the name of the other driver, the court found the policy ambiguous.

H. Unidentified Driver’s Projection of Gravel from Roadway into Insured’s Tractor Trailer Was Sufficient to Demonstrate “Hit and Run” Accident

The facts in *Walker v. Employers Insurance of Wausau*¹²⁷ involve a common attempt to define a “hit and run accident” for purposes of uninsured motorist coverage. A tractor-trailer operator was traveling along the highway, when a pick-up truck swerved into the tractor-trailer driver’s lane.¹²⁸ While “the pick-up truck passed within inches” of the tractor-trailer, there was no impact between the vehicles. However, the pick-up truck traveled into the shoulder of the roadway, where it projected gravel onto the grill and fender of the tractor-trailer, causing the driver to lose control and become injured in a serious accident.¹²⁹

The policy at issue defined an “uninsured auto,” in part, as a “hit-and-run auto.”¹³⁰ The parties agreed that there was no direct contact between the tractor-trailer and the pick-up truck; however, the insured argued that the spray of gravel from the pick-up truck onto the tractor-trailer, was sufficient to show “indirect” physical contact¹³¹ to support a finding of coverage.¹³² As a result, the court found that an issue of fact existed on whether physical contact between the pick-up truck and the tractor-trailer occurred.¹³³ Consequently, the court reversed the trial court’s granting of summary judgment to the uninsured motorist carrier.¹³⁴

I. Liability Insurer Denied Right of Intervention in Underlying Litigation to Contest Coverage Issues

The decision of *Allstate Insurance Co. v. Keltner*¹³⁵ addressed an effort by an automobile liability insurer to intervene in underlying litigation to protect its interest because of coverage matters. An automobile accident occurred when the

126. Insurers wish to have the tortfeasor’s name in order to assert a possible subrogation action to recover any amounts paid to the insured.

127. 846 N.E.2d 1098 (Ind. Ct. App. 2006).

128. *Id.* at 1100.

129. *Id.*

130. *Id.* at 1103-04.

131. The decision in *Allied Fidelity Insurance Co. v. Lamb*, 361 N.E.2d 174, 179 (Ind. Ct. App. 1977), determined that “indirect contact” was sufficient to establish a “hit and run” as required under an insurance policy. *See also* *Will v. Meridian Ins. Group, Inc.*, 776 N.E.2d 1233, 1237 (Ind. Ct. App. 2002) (finding that insured driver’s collision with a “pile of debris” in the roadway which came from another vehicle would be sufficient to show “indirect contact” for purposes of uninsured motorist coverage).

132. *Walker*, 846 N.E.2d at 1103.

133. *Id.* at 1105.

134. *Id.*

135. 842 N.E.2d 879 (Ind. Ct. App. 2006).

insured driver lost control and crashed her vehicle into a telephone pole.¹³⁶ As a result, one of three siblings riding as passengers inside the car was killed, while the other two sustained personal injuries.¹³⁷ The driver's liability insurer settled with the estate of the decedent passenger for the full amount of policy limits available.¹³⁸ The settlement that was achieved reserved the rights of the other two passengers to pursue their own lawsuits as a result of the accident.¹³⁹

The two other passengers filed a lawsuit against the driver seeking to recover for their own personal injuries as well as seeking emotional distress damages from observing the death of their brother inside the vehicle.¹⁴⁰ As a result of the emotional distress claims, the insurer for the tortfeasor driver filed a declaratory judgment action in federal court claiming that it possessed no obligation to indemnify the two passengers for the emotional distress claims because it had already compensated the decedent's estate to the full extent of insurance coverage available.¹⁴¹

The appellate court ruled that the liability insurance carrier was not responsible to pay for any emotional distress damages related to the two passengers observing their sibling's death.¹⁴² As a result of the federal court decision, the insurer sought to intervene in the passengers' lawsuit against the driver.¹⁴³ It argued that if it did not intervene, there would be no way to differentiate any jury award to the passengers for personal injury damages as opposed to emotional distress damages.¹⁴⁴ In essence, the insurer contended that it possessed a significant interest in the litigation which could not be adequately protected if it was not granted permission to intervene.¹⁴⁵

The Indiana Court of Appeals refused to grant the insurer the right to intervene because it failed to establish that its interest would not be protected by the current action.¹⁴⁶ The court found that if a judgment was entered against the driver in a lump sum figure, a supplemental hearing would allow for the inclusion of evidence to determine an appropriate division of the damages between the personal injuries and emotional distress of the passengers.¹⁴⁷

Additionally, the court cited Indiana's policy to prevent the interjection of

136. *Id.* at 880.

137. *Id.*

138. *Id.* at 881.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* (citing *Allstate Ins. Co. v. Tozer*, 392 F.3d 950 (7th Cir. 2004)).

143. *Id.*

144. *Id.*

145. *Id.* at 882-83. Such a basis was necessary in order to comply with Indiana Trial Rule 24(a). The insurer contended that the defense counsel for the driver would not work to differentiate between the personal injury damages and the emotional distress damages because the driver would not have coverage for the emotional distress damages.

146. *Id.* at 883.

147. *Id.*

the fact that a defendant may possess liability insurance.¹⁴⁸ The court recognized the prejudicial effect upon the defendant if the jury is aware that the defendant may have insurance.¹⁴⁹ Consequently, the court refused to allow the insurer to intervene in the matter.¹⁵⁰

The court's decision is unusual, but appropriate. As best demonstrated by this case, the driver stands to be potentially prejudiced in having a fair and impartial allocation of damages if the jury is aware of the fact that insurance may indemnify him for any liability. This decision is unusual because support for such rationale has been eroding over the last few years.¹⁵¹

II. HOMEOWNERS CASES

A. *Indiana Supreme Court Interprets Whether Liability Coverage Is Available for Intentional Actions of Insured*

The decision of *Auto-Owners Insurance Co. v. Harvey*¹⁵² involved an unfortunate set of facts, but led to an interesting appellate decision. Harvey, a sixteen-year-old girl, engaged in sexual relations with Gearheart, a nineteen year old, at a boat ramp near the Wabash River.¹⁵³ Harvey eventually told Gearheart to stop, and a dispute between them developed where Harvey apparently pushed Gearheart on two occasions.¹⁵⁴ When Harvey approached him a third time, Gearheart put his hands on her shoulders and pushed Harvey, causing her to lose her balance, fall off the edge of the boat ramp, down a rocky embankment, and into the river, resulting in her drowning.¹⁵⁵ Gearheart eventually pled guilty to involuntary manslaughter.¹⁵⁶ Harvey's parents brought a negligence lawsuit against Gearheart and also sought declaratory relief on whether Gearheart's liability insurer was liable for his actions.¹⁵⁷

The liability insurer contended that it owed no coverage to Gearheart because: (1) there was no "occurrence" which was necessary to trigger a coverage obligation; and (2) Gearheart's conduct satisfied the "intended or expected harm" exclusion¹⁵⁸ in the policy. The trial court denied the liability

148. *Id.* at 884.

149. *Id.*

150. *Id.*

151. *See* *Stone v. Stakes*, 749 N.E.2d 1277 (Ind. Ct. App. 2001) (reference by plaintiff's attorney to defendant's attorney employment with insurance company during voir dire questioning was permitted).

152. 842 N.E.2d 1279 (Ind. 2006).

153. *Id.* at 1280.

154. *Id.*

155. *Id.*

156. *Id.* at 1281-82. Involuntary manslaughter is enacted under Indiana Code section 35-42-1-4(c) (2004).

157. *Harvey*, 842 N.E.2d at 1282.

158. The policy provision stated that no liability coverage applied "to bodily injury or property damage *reasonably expected or intended by the insured*. This exclusion applies even if the bodily

insurer's summary judgment motion by finding that there was an issue of material fact.¹⁵⁹ On an interlocutory appeal, the court of appeals reversed, finding that there was no coverage because there was no "occurrence" under the policy.¹⁶⁰

The Indiana Supreme Court addressed both contentions by the insurer. First, on the question of whether there was an "occurrence," the policy defined an "occurrence" as "an accident that results in bodily injury or property damage and includes, as one occurrence, all continuous or repeated exposure to substantially the same generally harmful conditions."¹⁶¹ The insurer contended that Gearheart's testimony established that Harvey's death was the natural and probable result of Gearheart's intentional acts of pushing her, not because of an "accident."¹⁶²

The supreme court agreed that implicit within the meaning of "accident" to establish an "occurrence" in an insurance policy, is the lack of intentional conduct on the part of the insured.¹⁶³ Nevertheless, the court concluded that the definition of "occurrence" was ambiguous:

The policy language does not require that the "occurrence" or "accident" be limited to the actions of the insured. The claimed damages clearly arise out of [Harvey's] death, and the coverage ambiguity thus is whether the death should be considered to have been caused by the event of Gearheart's pushing or by the event of [Harvey's] drowning. If the required "accident" refers to Gearheart's push, then it is undisputed that it did not occur unexpectedly or unintentionally. If it applies to [Harvey's] slip, fall, and drowning, however, it is not clear that the drowning was clearly unexpected and unintentional. It was obviously unexpected and unintentional from [Harvey's] perspective, and possibly so from Gearheart's point of view.¹⁶⁴

The supreme court ultimately rejected the liability insurer's suggestion that Harvey's drowning death, even though resulting from the intentional pushing of Gearheart, was not an "occurrence."¹⁶⁵ The court also rejected federal court rulings interpreting Indiana law, that claims for damages arising from a volitional

injury or property damage is of a different kind or degree, or is sustained by a different person or property, than that reasonably expected or intended." *Id.* at 1288 (emphasis in original).

159. *Id.* at 1282.

160. *Id.* at 1281.

161. *Id.* at 1283.

162. *Id.*

163. *Id.* at 1283; *see also* Red Ball Leasing v. Hartford Accident and Indem. Co., 915 F.2d 306, 311-12 (7th Cir. 1990) (finding that insured's intentional repossession of trucks was not an "occurrence" and not covered); Allstate Ins. Co. v. Davis, 6 F. Supp. 2d 992, 996 (S.D. Ind. 1998) (finding that the death of child resulting from insured intentionally bouncing child on knee, was not an occurrence).

164. *Id.* at 1284-85.

165. *Id.* at 1285.

act of an insured did not establish an “occurrence” under a liability policy.¹⁶⁶

Likewise, the court also refused to find, as a matter of law, that because the insured plead guilty to involuntary manslaughter, that conviction established that there was no “occurrence” to trigger coverage.¹⁶⁷ By rejecting this argument, the court stated:

At most, the guilty plea shows only that Gearheart intended the battery (improper touching by pushing [Harvey]), and that her death resulted. But it does not establish that he intended [Harvey’s] slip, fall, and drowning, and thus does not preclude the assertion that her death was accidental, and thus an “occurrence.” . . . The push was not accidental, but a genuine issue exists whether the drowning and resulting death were.¹⁶⁸

The liability insurer additionally argued that it owed no liability coverage to Gearheart because his actions “intended” to harm Harvey, and were subject to the intentional acts exclusion.¹⁶⁹ The supreme court rejected that argument by indicating that it could not find as a matter of law that Gearheart intended to harm Harvey.¹⁷⁰ Quite simply, the court found that there were conflicting facts as to whether Gearheart intended to harm Harvey, and summary judgment was properly denied.¹⁷¹

This decision is a significant attempt by the court to clarify policy language that is very difficult to apply in real world situations. Quite simply, the court found that even though the insured engaged in intentional conduct by pushing the drowning victim, there was a question of fact as to whether he intended to harm her. To the extent the evidence presented to the trier of fact would show that the insured engaged in intentional conduct to harm Harvey, the coverage could be determined not to exist.

B. Homeowners Insurance Policy Applied to Accident Involving Automobile Despite “Motorized Vehicle” Exclusion

Although homeowners insurance policies are intended to apply to risks associated with a home and not an automobile, many unique circumstances arise where the question presented is whether the homeowners policy may apply to accidents involving motor vehicles. In *Allstate Insurance Co. v. Burns*,¹⁷² the insurer supplied a homeowners policy to the named insureds, including their son.¹⁷³ The son purchased a pick-up truck from a used car dealership, and

166. *Id.* at 1286.

167. *Id.* at 1287.

168. *Id.*

169. *Id.* at 1288.

170. *Id.* at 1291.

171. *Id.*

172. 837 N.E.2d 645 (Ind. Ct. App. 2005).

173. *Id.* at 647.

acquired automobile insurance and a vehicle license registration for the truck.¹⁷⁴ Eventually, "the truck's transmission failed, and the [truck] would no longer run."¹⁷⁵ The son decided to try to fix the truck with the help of his friend.¹⁷⁶

The son kept the truck parked behind his parents' home.¹⁷⁷ In the meantime, he canceled the automobile insurance on the truck.¹⁷⁸ The son acquired replacement parts, and with the help of the friend, planned to manually move the truck from behind the garage to a barn also located on his parents' property.¹⁷⁹ In order to move the truck, the son planned to start the truck so he could use the power steering and brakes.¹⁸⁰

The son opened the hood of the truck and poured gasoline into the carburetor to prime the truck.¹⁸¹ The truck would not start, and the friend poured more gasoline into the carburetor.¹⁸² When the son attempted to start the engine, the gasoline fumes ignited and burned the friend.¹⁸³ As a result of the accident, the friend brought a lawsuit against the son, and the son sought liability insurance coverage under his parents' homeowner's policy.¹⁸⁴

There was no question about the son's status as an insured under the parents' homeowners' policy; however, the insurer relied upon an exclusion to deny coverage which provided:

Exclusions—Losses We Do Not Cover

...

- 5) We do not cover bodily injury or property damage arising out of the ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of any motorized land vehicle or trailer.¹⁸⁵

However, the exclusion also had an exception such that it did not apply to: "a) a motorized land vehicle in dead storage or used exclusively on the residence premises."¹⁸⁶ The policy did not define "dead storage."¹⁸⁷

The homeowners' insurer eventually sought summary judgment in a declaratory judgment action by relying upon the exclusion.¹⁸⁸ In response, the

174. *Id.*

175. *Id.* at 648.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 649.

186. *Id.*

187. *Id.*

188. *Id.*

friend also sought summary judgment by contending that the exception to the “motor vehicle” exclusion applied because the truck was in “dead storage.”¹⁸⁹ The trial court denied the insurer’s summary judgment motion and entered summary judgment in favor of the son finding that he was entitled to coverage.¹⁹⁰ Specifically, the court found that the facts were undisputed that the truck was in “dead storage” such that the exception to the exclusion applied.¹⁹¹

The court attempted to determine the meaning of “dead storage” for purposes of the exception by relying upon decisions from other jurisdictions.¹⁹² Based upon the fact that the son undertook steps to refrain from using the vehicle on the roadways by canceling his insurance and registration, and that the truck remained on the son’s premises with movement only on the property, the court concluded that the truck was in “dead storage” within the meaning of the exception to the exclusion.¹⁹³

It is unusual for homeowners’ insurance policies to apply to incidents involving automobiles.¹⁹⁴ However, because the truck was never removed from the property, the court seemed convinced that the homeowners’ policy was appropriate to respond to this fact situation.

III. COMMERCIAL CASES

A. *Property Insurer Required to Pay for Insured’s Attorney Fees Resulting from Third Party Litigation of the Insured*

In *Masonic Temple Ass’n of Crawfordsville v. Indiana Farmers Mutual Insurance Co.*,¹⁹⁵ a fraternal organization brought a declaratory judgment action for coverage against its own property insurer, who denied its property claim for cracks in the wall and ceiling resulting from construction of an adjoining building.¹⁹⁶ The fraternal organization also pursued a lawsuit against the contractors involved on the construction project to seek recovery for their alleged

189. *Id.*

190. *Id.* at 649-50.

191. *Id.* at 650.

192. *Id.* at 651-53. The court relied upon the following court decisions: *Allstate Insurance Co. v. Geiwitz*, 587 A.2d 1185 (Md. Ct. Spec. App. 1991); *Hogan v. O’Brien*, 206 N.Y.S. 831 (App. Div. 1924), *Nationwide Mutual Fire Insurance Co. v. Allen*, 314 S.E.2d 552 (N.C. Ct. App. 1984), which determined that vehicles staying on an insured’s premises and not upon public roadways were generally considered to be in “dead storage” for purposes of the policy exclusion.

193. *Allstate Ins. Co.*, 837 N.E.2d at 653-54.

194. *See Franz v. State Farm Fire & Cas. Co.*, 754 N.E.2d 978, 981 (Ind. Ct. App. 2001) (stating that if use of vehicle was “efficient and predominating cause” of accident, then motor vehicle exclusions under general liability policy will apply).

195. 837 N.E.2d 1032 (Ind. Ct. App. 2005).

196. *Id.* at 1034. The insurer denied the claim by contending there was an “earth movement” exclusion and that there was not a “collapse” as necessary to trigger coverage. *Id.* Those issues were addressed in another appellate proceeding in *Masonic Temple Ass’n of Crawfordsville v. Indiana Farmers Mutual Insurance Co.*, 779 N.E.2d 21 (Ind. Ct. App. 2002).

negligence.¹⁹⁷ Eventually, a settlement was reached between all parties to both lawsuits, but the fraternal organization excepted from the settlement its claim against the insurer to recover attorney fees relating to the pursuit of litigation against the contractors.¹⁹⁸

The property insurer filed a summary judgment motion, contending that Indiana follows the general rule that each party to a litigation pays its own attorney fees.¹⁹⁹ The fraternal organization asked the court to adopt an exception to the general rule to permit recovery of attorney fees that are incurred in actions with third parties, brought about by a defendant's breach of contract.²⁰⁰ In other words, "because the litigation expenses are merely a form of damages caused by the defendant's misconduct," they should be recoverable damages as part of the breach of contract action.²⁰¹

The court agreed with the fraternal organization and adopted a "third-party litigation" exception to the general rule.²⁰² The court stated:

When the defendant's breach of contract caused the plaintiff to engage in litigation with a third party to protect its interests and such action would not have been necessary but for defendant's breach, attorney fees and litigation expenses incurred in litigation with a third party may be recovered as an element of plaintiff's damages from defendant's breach of contract.²⁰³

While the court permitted the insured to recover its expenses for third party litigation, the American Rule still applies to prevent the insured from recovering its attorney fees in litigation on coverage matters with its insurer.

B. The Court Concludes That a Claimant Seeking Medical Payments Coverage Can Sue Insurer Directly for Coverage, but Cannot Recover Under Theory of Breach of Duty of Good Faith

In *Cain v. Griffin*,²⁰⁴ a restaurant patron slipped and fell while visiting the restaurant.²⁰⁵ Under the restaurant's liability insurance policy, it provided medical bill payment coverage for medical expenses of the patron irrespective of fault.²⁰⁶ The patron's lawyer apparently sent medical bills to the restaurant owners, but no evidence existed that the restaurant's liability insurer had received

197. *Masonic Temple Ass'n of Crawfordsville*, 837 N.E.2d at 1035.

198. *Id.*

199. *Id.* at 1037; *see Ind. Glass Co. v. Ind. Mich. Power Co.*, 692 N.E.2d 886, 887 (Ind. Ct. App. 1998) (stating the general rule that in the absence of a statute, contract, or rule to the contrary, a party cannot recover its attorney fees in litigation).

200. *Masonic Temple Ass'n of Crawfordsville*, 837 N.E.2d at 1038.

201. *Id.*

202. *Id.* at 1039.

203. *Id.*

204. 849 N.E.2d 507 (Ind. 2006).

205. *Id.* at 508.

206. *Id.* at 514.

the medical bills.²⁰⁷ When the insurer failed to pay the medical bills, the patron filed a negligence claim against the restaurant owners, and added their liability insurer as a defendant for breach of contract and breach of the duty of good faith.²⁰⁸

Eventually, the insurer tendered a check to the patron for the medical bills, but did not include interest.²⁰⁹ The patron “refused to cash the check.”²¹⁰ The liability insurer moved for pretrial summary judgment, arguing that the patron was a third party claimant and that the insurer did not owe the patron any duty of good faith.²¹¹

The trial court granted the insurer’s summary judgment motion on the patron’s complaint.²¹² The court of appeals affirmed the trial court’s ruling.²¹³

The Indiana Supreme Court observed a duty of good faith owed by an insurer to its insured.²¹⁴ Consequently, the supreme court analyzed the status of the patrons to the restaurant’s insurer.²¹⁵ The court concluded that the patron was a third party beneficiary to the medical payments coverage that the restaurant possessed with its liability insurer.²¹⁶ As a third party beneficiary, the patron could bring a direct action against the restaurant’s insurer to recover medical payment benefits despite Indiana’s prohibition²¹⁷ against direct lawsuits against insurers.²¹⁸

However, the supreme court refused to recognize that the patron could bring an action against the insurer for alleged breach of duty of good faith.²¹⁹ The court specifically found that third party beneficiaries do not possess the “special relationship” that the court determined was the basis to create a duty of good faith between an insurer and the insured.²²⁰ Consequently, the court affirmed the grant of summary judgment to the insurer on the claim for breach of the duty of good faith.²²¹

This decision appears very sound in its application. The patron should be afforded the right to directly sue to obtain medical payments coverage. However, because the patron also is a third party litigant against the restaurant, she has no “special relationship” to support a claim for breach of the duty of good faith.

207. *Id.* at 509.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. 826 N.E.2d 41 (Ind. Ct. App. 2005), *vacated*, 849 N.E.2d 507 (Ind. 2006).

214. *Cain*, 849 N.E.2d at 510.

215. *Id.* at 514.

216. *Id.*

217. *See Menefee v. Schurr*, 751 N.E.2d 757, 760 (Ind. Ct. App. 2001).

218. *Cain*, 849 N.E.2d at 515.

219. *Id.*

220. *Id.*

221. *Id.*

Instead, the insurer's loyalty and duty should be to its insured: the restaurant.

C. The Court Interprets "Product Liability" Exclusion in Favor of Insured

The court in *Eli Lilly and Co. v. Zurich American Insurance Co.*²²² addressed an interesting set of facts requiring interpretation of a "product liability" exclusion under a commercial general liability policy. The insured was a drug maker that manufactured a chemotherapy drug.²²³ The drug maker supplied the drug in a powdered format to an oncological pharmacist, who custom formulated prescriptions utilizing the drug with a saline solution.²²⁴ The pharmacist improperly diluted the drug when filling prescriptions, resulting in personal injury lawsuits by the unknowing victims.²²⁵ The pharmacist was criminally indicted for product tampering and other charges.²²⁶ The victims' lawsuits contended that the drug maker "either should have known or did know" of the pharmacist's actions, and should have warned the patients to prevent their injuries.²²⁷

The drug maker notified its insurers of the victims' lawsuits.²²⁸ The drug maker eventually settled the victims' lawsuits and sought reimbursement from the various insurers providing liability coverage.²²⁹ One of the insurers claimed that its policy contained a "products liability" endorsement to avoid coverage for lawsuits involving the drug maker's products.²³⁰ The policy defined "product liability hazard" by stating:

[Product Liability Hazard] mean[s] Personal Injuries and/or Property Damage arising out of the Insured's Products or reliance upon a representation or warranty made at any time with respect thereto, but only if the Personal Injuries or Property Damage occurs away from the premises owned by or rented to the Named Insured and after physical possession of such products has been relinquished to others.²³¹

The question presented to the court was whether this "product liability" exclusion applied. The insurer contended that because the lawsuit related to a product manufactured by Lilly, the exclusion applied.²³² However, the insured contended that the allegations asserted against the drug maker focused upon

222. 405 F. Supp. 2d 948 (S.D. Ind. 2005).

223. *Id.* at 952.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 952-53. The particular language of this exclusion stated: "This Policy is amended in that notwithstanding anything contained herein to the contrary, it shall not apply to—i) the Products Liability Hazard;" *Id.* at 952.

231. *Id.* at 953.

232. *Id.*

matters other than whether the harm was caused by the product, such that coverage was applicable.²³³

In addressing the situation, the court focused upon an insured's reasonable interpretation of the phrase "arising out of."²³⁴ In addressing that issue, the court stated:

We conclude on that basis that an ordinary policyholder, reading a product liability exclusionary clause which contains language excluding from coverage any claim for damages "arising out of the Insured's Products," would consider himself without coverage for a claim asserting that his product had caused some harm. We do not believe an ordinary policyholder would read this language to bar coverage of a claim that he failed to alert someone to the activities of another who was wrongfully dispensing the product.²³⁵

Consequently, the court concluded that the drug maker was entitled to coverage as the allegations asserted against the drug maker focused upon actions other than for injuries caused by the product itself.²³⁶

This decision has a very interesting analysis of how to address the interpretation of a policy from an "ordinary policyholder" perspective. The court's focus on the fact that the product did not cause the victims' harms, but instead another person's dispensing of the product caused the harm, appears to be a sound application of the exclusion.²³⁷

233. *Id.*

234. *Id.* at 954.

235. *Id.*

236. *Id.*

237. The court also addressed and granted summary judgment to the insurer on the drug maker's bad faith claim. *Id.* at 957-58. The court's decision contains an excellent analysis re-emphasizing that an insurer does not breach the duty of good faith owed to its insured for "an inadequate investigation or flawed interpretation of Indiana law." *Id.* at 958.

SURVEY OF DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN*

I. PROPOSED PATENT RULE CHANGES

During the survey period, the United States Patent and Trademark Office (“PTO”) proposed rule changes in two areas that, if adopted, will significantly and substantially alter prosecution practices that have been accepted for decades. At the time of this writing, these rules have not been put into practice, with the PTO noting on its website that the rule changes will not take effect without a minimum thirty-day notice to practitioners. The importance of these potential rule modifications in changing currently-accepted prosecution practices and possibly in altering the scope of protection available to a particular invention disclosure cannot be underestimated. The following discussion will review the proposed rule changes and detail a few of the expected results.

A. *Changes to Continuation Practice*

Since at least the enactment of the 1952 Patent Act, the statutes have allowed one to file patent applications that disclose all or a part of the disclosure of another pending patent application and claim priority to that pending application.¹ Such “continuation” (containing only subject matter previously disclosed in a pending application) or “continuation-in-part” (or “CIP,” which includes additional new subject matter) applications are quite common, as they afford the opportunity to obtain claim coverage of a different scope compared to that of the earlier application and/or to add subject matter that has been developed as the inventive product or method has been used and as advantages or benefits have been discovered. As the statute makes plain, multiple such applications may be filed, each claiming the benefit of one or more prior applications.

The PTO, however, offered new amendments limiting not only the number of continuing (i.e., continuation and CIP) applications that can be filed, but also the filing of more than one Request for Continued Examination (“RCE”).² The

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1. See 35 U.S.C. § 120 (2000) (“An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States . . . which is filed by an inventor or inventors named in the previously filed application shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of . . . the first application or on an application similarly entitled to the benefit of the filing date of the first application . . .”).

2. Changes to Practice for Continuing Applications, Requests for Continued Examination

amendments were proposed, according to the PTO, as a means to keep an “excessive number [of continuing applications from] detract[ing] from the agency’s ability to examine new patent applications.”³ In a nutshell, as of the effective date of the rule changes, one may not be able to file *any* of a continuation, CIP, voluntary divisional application, or an RCE, with the benefit of an earlier application.

The amended rules would allow one to file only one continuing application that claims priority benefit from a given application as a matter of right. In this context, a “continuing application” includes both nonprovisional applications and international applications that designate the United States which claim the benefits of sections 120, 121 or 365(c) from a given application. Put less formally, the definition of “continuing application” for the amended rules would include continuations, CIPs, voluntary divisionals, or RCEs. Conversely, an application that claims priority only to (1) an application for an inventor’s certificate, (2) an application filed in a foreign country, or (3) an international application designating countries other than the United States are not considered to be “continuing applications.”⁴ Divisional applications made necessary by a restriction requirement issued and made final by the examiner in a pending application are not “voluntary divisionals,” and therefore do not count as continuing applications.⁵ However, if one files an application characterized as a divisional from an application in which a restriction requirement does not appear, then that application would be considered a “voluntary divisional” within the ambit of the proposed rule amendments.⁶

If one desires to file a second continuing application under the proposed new rules, the application must be accompanied by a petition and fee (originally proposed to be \$400).⁷ The petition must show why evidence submitted with the continuing application, or RCE, amendment(s), argument(s) or evidence submitted with it, could not have been presented earlier.⁸ The PTO thus would place the onus on the applicant to make a showing of some level of necessity to its continuation or RCE filing. Not only is a burden created on the applicant that has never before existed, but the “could not have been presented” burden appears to be quite high.

Where the second application is a CIP, the proposed rule changes will allow the filing of a continuation or a new CIP that claims only the matter added in the

Practice, and Applications Containing Patentably Indistinct Claims, 71 Fed. Reg. 48 (Jan. 3, 2006) (scattered sections throughout pages 48-61) (to be codified at 37 C.F.R. pt. 1) [hereinafter *Changes to Practice for Continuing Applications*].

3. See <http://www.uspto.gov/web/offices/pac/dapp/opla/presentation/focuspp.html> (last visited on Mar. 8, 2007) [hereinafter *USPTO website*].

4. *Changes to Practice for Continuing Applications*, 71 Fed. Reg. at 52.

5. *Id.* at 53.

6. *Id.*

7. *Id.* at 56.

8. *Id.* at 58.

first CIP.⁹ Thus, where an original application discloses certain subject matter, and a first CIP includes all of that subject matter plus extra disclosure, a continuing application claiming benefit to that first CIP can be filed so long as that continuing application is directed only to the extra disclosure in the first CIP.¹⁰ However, in that case, it appears that the term of the continuing application will be measured from the filing date of the original application, and not from the filing date of the CIP application.

If allowed to come into force and not overridden by the language of the Patent Act as noted below, this change to PTO practice is likely to have far-reaching effects not only on the practice of patent law, but also on the scope of applications and patents issued from them. With the knowledge that only one follow-up application can be filed, in general, an initial application will become significantly more involved and expensive as applicants attempt to find needles in the prior-art haystack. To ensure that first application results in quality issued claims without resort to an RCE, the scope of those claims will likely have to be made narrow in the beginning or under prosecution. While broader claims may have good arguments for allowance over cited references, there is the risk of having the examiner disregard those arguments and issue a final rejection from which minimal amendments are allowed. From that final rejection, it may be that only an RCE will be available to try to obtain any claims and that RCE will effectively end prosecution on that case, since no further continuing applications will be permitted absent the showing previously indicated. Of course, if the applicant chooses to appeal the rejection rather than file an RCE, he or she retains the ability to file a later continuing application, but has to devote substantial resources to preparing and arguing the appeal. Ironically, it is possible that the new rules will not solve the problem of overwork to which the PTO adverts, but will instead shift that burden to the Board of Patent Appeals and Interferences as applicants choose to appeal rather than go straight to a continuing application.

Of course, the applicant could file more than one application directed to the same subject matter as a pending application under the proposed new rules, but only one of the putative continuing applications could have the priority benefit of the parent application.¹¹ Combined with the fact that most U.S. applications are now published approximately eighteen months after the filing date, there is a substantial risk of the parent application being a statutory bar to “continuing” applications that do not claim priority to it.¹² If it takes eighteen months for a first action on the parent application, then the PTO’s first view of the subject matter arrives only when the parent application is published. The parent application becomes a statutory bar one year after its publication, and the applicant may not have allowed claims, or even the best available prior art from the PTO, before a decision must be made to file a new application that does not

9. *Id.* at 50.

10. *Id.*

11. *Id.* at 48.

12. *Id.* at 51.

claim priority to the parent.¹³

The applicant could also make more than one initial filing, that is, file more than one original application disclosing the same subject matter but with claims that differ at least slightly. In that situation, the applicant has the advantage of having multiple applications with the same filing date, without having filed any continuing applications. The obvious disadvantage, of course, is that the applicant may not have the benefit of the prosecution in one case to assist in the prosecution of the other. Moreover, the proposed rule amendments would require the applicant to identify such applications to the PTO and may give rise to a rebuttable presumption that the claims in the applications are not patentably distinct from each other.¹⁴ The PTO could also require elimination of claims from all but one of the applications unless the applicant provides a reason for retaining them.¹⁵ Strategies involving making an initial PTO filing that designates the United States could also be useful. PTO applications receive an initial preliminary examination that will alert the applicant to relevant prior art and will generally offer the applicant the opportunity to amend the claims prior to nationalization. The nationalization of the application in the United States is counted as an original filing rather than a continuing application.¹⁶ Thus, the applicant has some knowledge of the examiner's views and the art he or she will rely on as prosecution in the PTO begins.

Some debate remains over whether the proposed rule changes can be implemented. As discussed above, the plain language of 35 U.S.C. § 120 permits multiple continuing applications to be filed, each of which claims priority to a parent application.¹⁷ It is the author's view that this is likely the reason that the rules amendments concerning continuations have not been put into effect, as further consideration is given to the jurisdiction of the PTO in this area. Further, it is this author's opinion that the proposals to curtail continuation practice in this way would run afoul of the statute and accordingly would be struck down as contrary to law. Nonetheless, it is recommended for practitioners and businesspersons that are concerned with patents to consider now how to alter or review their patent filing practices should these rules come into force.

B. Changes to Information Disclosure Statement Practice

As is well known, the rules of patent practice require the prosecuting attorney, the inventor(s), and others involved with a patent application to provide to the PTO all references that an examiner may consider to be material to patentability.¹⁸ Such references are provided to the PTO by way of an information disclosure statement (IDS) which lists the references, along with a

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. 37 C.F.R. pt. 1.56 (2007).

submission of copies of foreign or non-patent references.¹⁹ Of course, depending on the subject matter claimed in an application, the relative “crowdedness” of the particular art, and other factors, there may be numerous references that could be material to patentability. Frequently the patent attorney is faced with a dilemma: to leave out references that are on the margins, and leave the patent (and the attorney) open to a charge of inequitable conduct, or to include such references and be accused of hiding the wheat among a large amount of chaff in the hope that the examiner will not find the good reference(s).

The PTO has taken the position that applicants can provide information in a way that hinders examination, such as by sending a long list of references, or by sending long references of which only a relatively small part may be of particular relevance.²⁰ To address those perceived problems, the PTO’s proposed rule changes²¹ would again place the burden on the applicant to identify and cite only the most relevant reference documents, so as to provide the examiner with useful and relevant information early in the examination process. Documents that arguably have questionable or marginal relevance would be eliminated, making a clearer path to the best available information.

For the time period before the first office action on the merits (or within three months of the application’s filing date), any references cited in a foreign search (i.e. by a foreign patent office or by the PTO in a PCT application) can be cited without provision of additional information or a certification.²² For references from other sources, if an IDS does not list more than twenty references itself or in combination with other IDS submissions, no explanation regarding any reference is generally required, just as with the current practice. However, the applicant would be required under the amended rules to provide an “explanation” for any reference not in English or that is longer than twenty-five pages.²³ A similar “explanation” must be provided for *every* document in cases where more than twenty references are listed.²⁴

That explanation must be quite detailed under the proposed rule amendments. The portion of the document that caused it to be cited must be identified, along with a description of how the teaching, feature, or specification part in the document correlates with the language of the claims. Effectively, the applicant would be required to spell out how the references apply to his or her claims.²⁵ Thus, this provision is a major change from existing practice in which no assumption as to the level of materiality or relevance of the reference is to be made from the mere fact that the reference is cited. Under current practice, the

19. *Id.* §§ 1.97-1.99.

20. *Id.*

21. *See* Changes to Information Disclosure Statement Requirements and Other Related Matters, 71 Fed. Reg. 38,808 (July 10, 2006) (to be codified at 37 C.F.R. pt. 1) [hereinafter Changes to Information Disclosure Statement Requirements].

22. 37 C.F.R. pt. 1.97(e).

23. Changes to Information Disclosure Statement Requirements, 71 Fed. Reg. at 38,810.

24. *Id.* at 38,819.

25. *Id.* at 38,820.

burden is on the PTO to establish that a reference includes features that are the same as or otherwise relevant to elements of claims in an application.²⁶ If the rule changes go into effect, an applicant that knows of more than twenty potentially relevant references will be faced with the daunting task of providing the necessary explanation of each of them, thereby limiting the scope of the claims to a great degree, or making a judgment that some of the references are cumulative or can otherwise be left out of the IDS, inviting inequitable conduct allegations.

For the period after the first office action on the merits, new references could be submitted, under the proposed rule, generally only if they were cited by a foreign patent office and were cited to the PTO within three months, or if they are accompanied by the description of all of the references as noted above.²⁷ That description must also include a discussion of the qualities of the reference(s) that make them non-cumulative with respect to other references already in the case.²⁸ Once again, a significantly larger amount of analysis and explanation would be necessary, with the concomitant likelihood of greater limitation of protection as a result of the required representations to the PTO. After allowance, the proposed new rule would require not only the explanatory information noted above, but also an amendment (if necessary) or an explanation of why the claims as they stand are patentable over the newly-cited references.²⁹

Once again, these rules have been published for comment, and the response period has run.³⁰ There has not, however, been any announcement of when the rules will come into effect. At the time of this writing, it has been more than six months since the comment period ended. Thus, there is some speculation that these rules may not, in fact, be implemented. Should the decision be eventually taken to implement them, a minimum thirty-day period of notice will be given.

II. RECENT CASES CONCERNING NON-COMPETITION AGREEMENTS

A. *Dicen v. New Sesco, Inc.*

In December, 2005, the Indiana Supreme Court provided its first comments in some time concerning covenants not to compete. In *Dicen v. New Sesco, Inc.*,³¹ the court took a different view of non-compete agreements incidental to sale of a business, as compared to non-compete agreements required by an employer of his or her employees.³²

The plaintiff, *Dicen*, was one of the founders of a company called *Sesco*, relying on his years of experience with the Indiana Department of Environmental

26. *Id.*

27. *Id.* at 38,810, 38,814.

28. *Id.* at 38,810, 38,815.

29. *Id.*

30. See USPTO website, *supra* note 3.

31. 839 N.E.2d 684 (Ind. 2005).

32. *Id.*

Management (IDEM) to provide consulting to businesses relating to environmental regulations. Dicen's position included managing SESCO's test division, marketing its services, and training others.³³ Within two to three years, an investment group had incorporated New SESCO, Inc. in order to purchase the assets of SESCO and other companies owned by Dicen and his co-founders. As part of the sale, Dicen executed a "non-solicitation" covenant that prevented him from soliciting business from particular persons or entities for a five-year period. He also executed an employment agreement through which he would be employed by New SESCO. Part of that agreement required Dicen not to work in the same field or use confidential information during his employment and for two years afterward.³⁴

Dicen worked for New SESCO doing the same tasks he had done for SESCO for about three years, then left to begin a new smoke stack testing company. Six months later, New SESCO sued Dicen for breach of the purchase and employment agreements, and Dicen was enjoined from soliciting business from past or current customers of New SESCO. On appeal, however, the court of appeals reversed in part, finding that the non-competition provision in the employment agreement was unenforceable.³⁵ It also found that the non-solicitation provision in the purchase agreement was overbroad, but the contract authorized modification by the court "to effect the intent of the parties."³⁶

The supreme court granted transfer and considered whether either or both of the agreements were unenforceable.³⁷ It began with the premise that covenants not to compete are not favored, and while courts have enforced reasonable restrictions, unreasonable restrictions are struck from agreements if divisible therefrom (the "blue pencil doctrine").³⁸ However, it then distinguished "covenants not to compete ancillary to the sale of a business," stating that such covenants generally "stand in better stead" apparently compared to other non-competition covenants.³⁹ The reasons for that standing, according to the court, are that commonly the sale of a business finds the parties with more equal bargaining power, provides proceeds to the seller that can be used for his or her support, and generally includes a premium for not competing with the purchaser. An employment agreement, on the other hand, does not provide such features, and the employee may only be able to rely on his or her own skills.⁴⁰

The court found that "[t]his more favorable review" of covenants relating to

33. *Id.* at 685-86.

34. *Id.*

35. *Id.* at 687.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (citing *Fogle v. Shah*, 539 N.E.2d 500, 502 (Ind. Ct. App. 1989); *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22, 28 (Mass. App. Ct. 1986)). Note that in *Fogle*, the evidence showed that a particular sum, about fifteen percent of the purchase price for the business, was directed to the covenant not to compete.

the sale of a business validated the trial court's finding that the covenant in the purchase agreement was reasonable was correct.⁴¹ Such a covenant, under the more liberal enforcement concept, is reasonable if "limited to the area of business involved."⁴² In the Indiana Supreme Court's view, the five-year time period and the identification of the prohibited activity as contracting and soliciting were both reasonable, even though "the reach of the covenant [was] not entirely clear."⁴³ The limit to the business area was also met because the covenant proscribed activities in competition with New Sesco.⁴⁴

Dicen's argument that the agreement was arbitrary because it allowed New Sesco to add new business to the proscribed-competition list from time to time was not accepted by the court. It found that language made the provision ambiguous rather than unreasonable, and that ambiguity was resolved by evidence between the parties that followed the execution of the agreement.⁴⁵ The court noted that even though it found the provision reasonable, and thus enforceable, the provision was to be construed against the drafting party, so that the injunction against Dicen would be limited to soliciting from entities specifically identified in the proffered evidence.⁴⁶

Perhaps most notably, the Indiana Supreme Court treated the employment agreement in essentially the same manner as the agreement in the business purchase agreement, without lengthy discussion.⁴⁷ That decision was based on the fact that the employment agreement was executed in the same transaction as the purchase agreement. The court reasoned from that fact that the parties' relative bargaining power was likely to be equal with respect to the employment agreement.⁴⁸ Nonetheless, having decided that the more liberal review standard would be applied to the employment agreement, the court then found the employment non-compete provision to be unreasonable.⁴⁹ A nation-wide restriction for two years "exceeds the bounds of reasonableness, especially when Dicen's contacts were in a limited number of states," in the court's view.⁵⁰ The geographic provision of the agreement could not be blue-penciled because the result would be no geographical limitation at all, and thus the entire covenant was adjudged unenforceable.⁵¹

While relatively short in terms of number of words, the *Dicen* opinion includes some notable legal positions. First, the court confirmed a separate

41. *Id.* at 688.

42. *Id.* (quoting *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235, 238 (Ind. 1955)).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 688-89 (citing *Ind. & Mich. Elec. Co. v. Terre Haute Indus., Inc.*, 507 N.E.2d 588, 598 (Ind. App. 1987)).

47. *Id.* at 689.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

review standard for non-compete covenants in an agreement for purchase of a business, as opposed to such covenants in an employment agreement.⁵² The latter covenants are “not favored” and should have rather stringent time and geography limitations. Purchase-agreement covenants are treated with a more liberal, but otherwise undefined, standard. Presumably, limitations that are unreasonable in the context of an employment agreement could be considered reasonable in a purchase agreement, and the line might be drawn with particular reference to the individual’s ability to work or other needs. It will be seen that business-sale non-compete agreements are significantly more likely to be enforced than those in employment agreements, and thus should be negotiated, prepared and reviewed so that compensation or other terms balance the expected effect of the provision. Certainly no term in a business purchase is ever a “throw away,” but if the Indiana courts are going to assume more equal bargaining power in a business purchase, the parties should exercise that power when considering a non-compete provision.

Moreover, it is not simply a matter of drawing a line between “purchase-based” covenants and “employment-based” covenants. The *Dicen* opinion treats a covenant not to compete in an employment agreement connected with the sale of a business in precisely the same way as a similar covenant in the purchase agreement.⁵³ There may be some room to argue that an individual’s needs would prevent enforcement of such a covenant, or that in connection with the employment agreement the bargaining power was not actually equal or comparable. Even so, it would seem prudent to make sure that consideration of an employment agreement in conjunction with sale of a business is negotiated with the more liberal standard of enforcing that covenant in mind.

The liberal standard does not affect other issues in the interpretation of the covenant. The *Dicen* opinion allows that regardless of the source of the covenant not to compete, it will still be interpreted against the drafting party.⁵⁴ Further, the fact that it may be ambiguous is not equivalent to unreasonability.⁵⁵ Ambiguity may be resolved by evidence outside of the four corners of the provision, while unreasonability renders the provision unenforceable.⁵⁶ “Blue-pencilling” is still a possibility, where the intent of the parties and reason permits.⁵⁷

B. MacGill v. Reid

Compare the *Dicen* opinion to the views of the Indiana Court of Appeals expressed in *MacGill v. Reid*,⁵⁸ which was decided after *Dicen*. The sole issue in *MacGill* was whether the covenant not to compete between the parties was

52. See *id.* at 687.

53. See *id.* at 689.

54. See *id.* at 688-89.

55. See *id.* at 688.

56. See *id.*

57. See *id.* at 687.

58. 850 N.E.2d 926 (Ind. Ct. App. 2006)

enforceable.⁵⁹ The plaintiff Reid owned a housekeeping business in which she matched independent-contractor housekeepers with her clients, and the fees from the clients were shared between Reid and the housekeepers.⁶⁰ MacGill was employed by Reid in an administrative capacity, and her employment contract included a covenant not to compete under which MacGill was not to “own, manage, or materially participate in any business substantially similar to [Reid’s] business within a 25 mile radius of [Reid’s] principal business address,” for a period of two years.⁶¹ After MacGill resigned, she distributed flyers and obtained one customer for whom she provided housekeeping services. Shortly thereafter, Reid sued to enforce the covenant not to compete, and the trial court granted summary judgment upholding the covenant.

On appeal, the court began its analysis of the covenant by citing at length from *Pathfinder Communications Corp. v. Macy*.⁶² The court noted the freedom of parties to enter contracts, but stated:

[C]ovenants not to compete are in restraint of trade and are not favored by the law. Noncompetition agreements are strictly construed against the employer and are enforced only if reasonable. Covenants must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest. To determine the reasonableness of the covenant, we first consider whether the employer has asserted a legitimate interest that may be protected by a covenant. If the employer has asserted such an interest, we then determine whether the scope of the agreement is reasonable in terms of time, geography, and types of activity prohibited. The employer bears the burden of showing that the covenant is reasonable and necessary in light of the circumstances. In other words, the employer must demonstrate that the former employee has gained a unique competitive advantage or ability to harm the employer before such employer is entitled to the protection of a noncompetition covenant.⁶³

This formulation places several specific hurdles in front of an employer, the first of which is the demonstration of an interest (i.e., some competitive advantage or openness to harm) that would allow a covenant in the first place. Once that showing is made, then the reasonableness of the covenant is tested on several grounds. The *MacGill* court did not quote any standard for considering the public interest, but the identification of that interest as a consideration in the analysis suggests that at least the public interest in free and fair competition could play a part.

59. *Id.* at 927.

60. *Id.* at 927-28.

61. *Id.* at 928.

62. *Id.* at 929 (citing *Pathfinder Commc’ns Corp. v. Macy*, 795 N.E.2d 1103, 1109 (Ind. Ct. App. 2003)).

63. *MacGill*, 850 N.E.2d at 929 (quoting *Pathfinder*, 795 N.E.2d at 1109) (internal citation and quotations omitted in original).

As to the employer's interest, the court started with the premise that Reid had to "show some reason why it would be unfair to allow the employee to compete."⁶⁴ Reid argued that her interests included the good will and reputation of the business, and the court agreed that Indiana law recognizes a protectable interest in such good will.⁶⁵ The court found a legitimate employer interest to be protected because good will includes customer information and "advantage acquired through representative contact," and MacGill had extensive client contact and compensation that depended on the success of the business.⁶⁶

The scope of the covenant was a different matter, as it is so often. The scope must be specific enough so that it coincides with the employer's legitimate protectable interest and clearly identifies to the employee what actions are not allowed.⁶⁷ Conversely, where a non-compete agreement is broad enough to prohibit harmless conduct, it is not a reasonable covenant.⁶⁸ As a particular example, a covenant is invalid if it restricts an employee from competing with a part of a business with which he or she was not associated.⁶⁹

MacGill argued, and the Indiana Court of Appeals agreed, that the covenant in question was too broad as extending beyond Reid's interest in protecting its good will.⁷⁰ Guided principally by the holding in *Norlund v. Faust*,⁷¹ with some references to other cases, the court decided that preventing MacGill from owning, managing or materially participating in a similar business "would [effectively] prevent her from employment by any capacity in any other cleaning business."⁷² To do so would have gone beyond protecting customers, housekeepers or other features of the business. The court noted that neither party requested it to "blue-pencil" the restriction of MacGill's activities, and that such blue-penciling would not have saved the covenant.⁷³ Further, it did not address the viability of the geographic restrictions in the covenant, since the unreasonable nature of the activities restriction voided the covenant.⁷⁴

MacGill provides a straightforward treatment of employment-based non-compete agreements. The stringent requirements for creating and enforcing such agreements begin with establishing a proper interest of the employer that must be protected. That interest may be a recognized intellectual property right, such as trade secret information or business good will, or can presumably be some other harm that the employee could visit upon the business through competition. Once such an interest is defined, the restrictions in the covenant are allowable so

64. *Id.* (quoting *Unger v. FFW Corp.*, 771 N.E.2d 1240, 1244 (Ind. Ct. App. 2002)).

65. *Id.*

66. *Id.* at 929-30.

67. *Id.* at 930.

68. *Id.*

69. *Id.* at 930-31.

70. *Id.* at 932.

71. 675 N.E.2d 1142 (Ind. Ct. App. 1997).

72. *MacGill*, 850 N.E.2d at 932.

73. *Id.* at 932 n.4 (citing *Norlund v. Faust*, 675 N.E.2d 1142, 1154 (Ind. Ct. App. 1997)).

74. *Id.* at 932-33.

long as they do not extend beyond what is necessary to protect that interest. Separate analyses as to the reasonableness of geographic, activity, time or other restrictions should be made. As noted above, the *Dicen* case suggests that much the same template for analysis is used in the context of non-compete agreements as part of the sale of a business, but the level of reasonableness in the business-sale context will be generally easier for the plaintiff to prove.

C. *Press-A-Dent, Inc. v. Weigel*

The case of *Press-A-Dent, Inc. v. Weigel*⁷⁵ was decided against the covenant not to compete based on the lack of a protectable interest.⁷⁶ The plaintiff claimed an interest in preserving its good will through the covenant, but could not overcome that first hurdle in litigation. Rather, the evidence established that there was no protectable good will in the plaintiff company.⁷⁷ That lack foreclosed the possibility of enforcing the covenant. To summarize, *Press-A-Dent* uses the same analytic framework as *MacGill*, but provides an example of a case in which no covenant not to compete would be proper because a protectable interest could not be shown.

III. TRADE SECRET CASES

A. *Physiotherapy Associates, Inc. v. White*

In *Physiotherapy Associates, Inc. v. White*,⁷⁸ the United States District Court for the Northern District of Indiana had before it a complaint alleging that the plaintiff's former employees had breached their duty of loyalty, misappropriated trade secrets, interfered with business relationships, committed fraud, and violated an administrative rule concerning solicitation of patients. In this opinion, after a review of subject matter jurisdiction, the court considered a motion to dismiss the trade secret misappropriation count.⁷⁹

The opinion recited parts of the Indiana Uniform Trade Secret Act,⁸⁰ and saw that the plaintiff's complaint alleged trade secrets in its "patient list and information . . . not generally available to . . . competitors and the secrecy of which is protected by federal law."⁸¹ The alleged misappropriation was soliciting patients on the plaintiff's premises during the defendants' treatment of patients. The court found that those assertions, even if proven, would not state an adequate cause of action because the alleged actions did not take the alleged trade

75. 849 N.E.2d 661 (Ind. Ct. App. 2006). This opinion is the most recent chapter in a business saga previously reviewed in the trade secret case of *Weston v. Buckley*, 677 N.E.2d 1089 (Ind. Ct. App. 1997).

76. *Press-a-Dent, Inc.*, 849 N.E.2d at 663.

77. *Id.* at 669-70.

78. No. 1:06-CV-22-TS, 2006 WL 545542, at *1 (N.D. Ind. Mar. 6, 2006).

79. *Id.* at *2.

80. IND. CODE § 24-2-3-3 (2004).

81. *See, e.g., Physiotherapy Assocs.*, 2006 WL 545542, at *6.

secrets.⁸² In the court's view, while customer lists have been considered trade secrets in proper situations, the plaintiff had not in fact alleged that the defendants had taken such a list.⁸³ It drew a distinction between the taking of a list of patients and actually soliciting the patients.⁸⁴ Relying on *PrimeCare Home Health v. Angels of Mercy Home Health Care, L.L.C.*,⁸⁵ which it viewed as drawing a similar distinction between taking a list and personal solicitation, the court took the position that the defendants in this case did not obtain their knowledge of the patients by improper means.⁸⁶

The holding that personal solicitation does not amount to misappropriation sounds quite odd at first, particularly in light of the plaintiff's claims of interference, breach of duty of loyalty, and violation of state administrative rules. At first blush, it would seem that conduct that can be characterized in those terms should constitute "improper means" sufficient to state a trade secret misappropriation claim; however, it must be borne in mind that the "improper means" generally applies to the acquisition of the trade secret information. The Indiana trade secret statute defines misappropriation, in pertinent part, as acquiring information by improper means, or disclosure or use of a trade secret acquired by improper means.⁸⁷ White and the other defendants had acquired their knowledge (patient's names) in a proper fashion, i.e., by working with them and performing their employment duties for the plaintiff. The court summarized: "While the Defendants' actions . . . may have violated their duty of loyalty, this does not automatically turn their knowledge of the Plaintiff's clients [legitimately obtained during treatment] into a protectable trade secret."⁸⁸

The court's analysis appears to be sound, at least as far as it goes. The conduct complained of may fit nicely into a claim for breach of duty or another tort, but the reality of the situation is that the defendants obtained their information by working as the plaintiff directed them, not through the statutory examples of "improper means" of theft, bribery, misrepresentation, breach of secrecy, and espionage. The employee may rest relatively easily on the trade secret front if he or she uses only the information obtained through his or her personal contact or work, but should still be aware of other duties owed to the employer.

Nevertheless, the court missed (or perhaps the plaintiff did not argue) another part of the Indiana trade secret statute, which includes within the scope of "misappropriation" use of a trade secret by one who had reason to know that the information was derived from or through a person who had a duty to maintain

82. *Id.* at *6-7.

83. *Id.* at *7.

84. *Id.*

85. 824 N.E.2d 376 (Ind. Ct. App. 2005); *see also* Christopher A. Brown, *Recent Developments in Intellectual Property Law*, 39 IND. L. REV. 1123, 1137-39 (2006) (discussing *PrimeCare*).

86. *Physiotherapy Assocs.*, 2006 WL 545542, at *7.

87. *See* IND. CODE § 24-2-3-2 (2004).

88. *Physiotherapy Assocs.*, 2006 WL 545542, at *8.

secrecy or limit use, or was acquired under circumstances giving rise to such a duty.⁸⁹ Based on the limited facts given in *Physiotherapy Associates*, one might easily conclude that even if the defendants' *acquisition* of patient information could not be a misappropriation, their alleged *use* of it would state a misappropriation claim sufficient to overcome dismissal. The court noted that the defendants had acknowledged that the count for breach of loyalty stated a claim, and yet did not consider whether that breach of loyalty claim would include a duty to maintain secrecy or limit use of the alleged trade secret information. Whether it was the court or the plaintiff that overlooked the "use" part of the definition of misappropriation, it seems that reliance on a theory of misappropriation by use of information to be kept secret or limited in use could have saved the trade secret count in this case.

B. The Finish Line, Inc. v. Foot Locker, Inc.

In counterpoint to the case of *Northern Electric Co. v. Torma*,⁹⁰ reviewed in last year's survey, there were two notable trade secret cases during the survey period in which the trade secret allegations were not proven, even though the kinds of information at issue and the conduct at issue appeared to be of a similar sensitivity to that at issue in *Torma*. *Finish Line, Inc. v. Foot Locker, Inc.*⁹¹ concerned allegations that the defendant had raided the plaintiff's employees in order to open stores in competition. Given the facts of the case, including that the employees at issue were employed "at-will" and were not covered by non-compete agreements, and that the plaintiff used similar policies and tactics in recruiting, there was no tortious interference or unfair competition in Foot Locker's actions.⁹²

As to a trade secret claim, the court considered the allegedly stolen information not to constitute trade secrets.⁹³ The first piece of information, a list of plaintiff's managers, had only names, addresses and telephone numbers, and was thus not extensive or detailed enough to be a trade secret, apparently because it was not valuable enough to the plaintiff.⁹⁴ The court also noted that the list was not stamped "confidential" and that an outside vendor was on the distribution list for the information.⁹⁵ Further, the court found that the information in the list was readily ascertainable by legitimate means, since a quarter of plaintiff's managers previously worked for defendant, the two companies have stores in many of the same locations, and managers for one

89. IND. CODE § 24-2-3-2(B).

90. 819 N.E.2d 417 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 748 (Ind. 2005); *see* Brown, *supra* note 85, at 1123-31.

91. No. 1:04CV877RLYWTL, 2006 WL 146633, at *1 (S.D. Ind. Jan. 18, 2006).

92. *Id.* at *7-9, *12.

93. *Id.* at *8, *10-11.

94. *Id.* at *10.

95. *Id.*

company are acquainted with managers for the other.⁹⁶ Name, address, and phone information concerning plaintiff's managers is thus easily obtained from personal knowledge and public directories.⁹⁷

The last two grounds for denying trade secret protection are straightforward, but the first of these grounds appears to weigh the value of the information to the plaintiff, and find that it does not meet a threshold value.⁹⁸ However, the Indiana trade secret statute, like other uniform trade secret acts, simply notes that information must derive economic value from not being generally known.⁹⁹ Perhaps the best way to harmonize the opinion with the statute is to consider the opinion to hold that the type of information at issue could not provide any economic value, which seems to comport with the ease with which the information could be legitimately duplicated.

A second piece of information alleged to be a misappropriated trade secret was a "rolling operating forecast" that indicated projections of plaintiff's business.¹⁰⁰ The court found that this, too, was not a trade secret because it did not have an independent economic value.¹⁰¹ Plaintiff had argued that the report would allow competitors to identify a "mark up" it received from its vendors as well as sales trends and product categories it intended to emphasize, but conceded that the report would not allow a competitor to determine such information for particular products or particular stores.¹⁰² Apparently, the court viewed such particularized information as being the economically-valuable substance, and without it, there was no economic value that would support trade secret status for the information.¹⁰³ Perhaps the plaintiff did not adequately argue the value of the information that was present in the report, or it is possible that once again the district court placed a threshold on value that the plaintiff could not reach. Notably, the court also found that because the report and its kin were not marked "confidential" or kept under lock, the plaintiff had not established reasonable steps to maintain secrecy.¹⁰⁴ This would seem to indicate that a threshold for secrecy of documents, at least in one judge's view, is to mark them as confidential and keep them locked up. Without that, perhaps no trade secret claim will lie.

C. M.K. Plastics Corp. v. Rossi

Similarly, the Indiana Court of Appeals affirmed a denial of a preliminary

96. *Id.* at *11.

97. *Id.* at *10.

98. *Id.*

99. IND. CODE § 24-2-3-2 (2004).

100. *Id.* at *6, *11.

101. *Id.* at *11.

102. *Id.*

103. *Id.*

104. *Id.*

injunction in the trade secret case of *M.K. Plastics Corp. v. Rossi*.¹⁰⁵ Rossi had been a vice president of sales and marketing for M.K. Plastics, and prior to that was an independent representative of them, and had experience in the field since 1977.¹⁰⁶ As vice president, Rossi had access to a variety of sensitive information, and kept important data and software on company computers. On his last day with the company, after having chosen to leave M.K. Plastics, Rossi turned in one of his computers (with the data from the others copied onto it and erased from them) and refused to sign a “release” agreement that included confidentiality and non-disclosure language.¹⁰⁷ Rossi later returned other items, including the erased computers. On the day he gave notice to M.K. Plastics, but before his last day, Rossi already had signed an employment agreement with a competitor that included incentives for developing a product that would compete with M.K. Plastics.¹⁰⁸ After a competing product came out, M.K. Plastics filed suit, alleging trade secret misappropriation, conversion and unjust enrichment.

The appellate court took note of the trial court’s finding of a lack of proper secrecy in denying the plaintiff’s requested injunction.¹⁰⁹ Passing by that issue, however, the court concentrated on whether the items that were taken by Rossi were, in fact, trade secrets.¹¹⁰ The first item, a sales binder showing lines of the company’s product and certain drawings, was “regularly distributed to independent manufacturer representatives and consulting engineers.”¹¹¹ The drawings were provided in a form that would allow engineers to use them with their own drawings or plans.¹¹² The binder was not secret, and therefore the court concluded it could not have trade secret protection.¹¹³

The second item was business contact information from the data on Rossi’s computers. M.K. Plastics relied on *Northern Electric Co. v. Tosma*¹¹⁴ and *U.S. Land Services, Inc. v. U.S. Surveyor, Inc.*¹¹⁵ to argue that Rossi’s compiled contact information was a trade secret that belonged to M.K. Plastics.¹¹⁶ However, the court viewed that argument as an invitation to re-weigh the evidence before the trial court, and declined to do so, noting that Rossi had provided evidence that the information in question was readily available from a number of sources and that he had kept only such information when he left.¹¹⁷

105. 838 N.E.2d 1068, 1070 (Ind. Ct. App. 2005).

106. *Id.* at 1070-74.

107. *Id.* at 1071-72.

108. *Id.* at 1072.

109. *Id.* at 1075-76.

110. *Id.* at 1076-77.

111. *Id.* at 1076.

112. *Id.*

113. *Id.*

114. 819 N.E.2d 417 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 748 (Ind. 2005); *see* Brown, *supra* note 85, at 1123-31.

115. 826 N.E.2d 49 (Ind. Ct. App. 2005); *see* Brown, *supra* note 85, at 1133-35.

116. *M.K. Plastics*, 838 N.E.2d at 1076.

117. *Id.* at 1077.

The appellate court noted that Rossi's evidence suggesting that he had kept only readily-available information and left behind other information was undisputed.¹¹⁸ Once again, the upshot is that there was nothing protectable by the trade secret law.

Nevertheless, the appellate court continued on to consider whether any actions that could be characterized as misappropriation had occurred. The plaintiff argued that the evidence demonstrated a systematic harvesting of data by Rossi, relying particularly on his access to product data, reports and drawings and his use of them in his work.¹¹⁹ The court, to the contrary, saw that evidence as showing the breadth of Rossi's access, but not suggesting that "he took any affirmative action to misappropriate . . . the information."¹²⁰ In response to arguments that Rossi "pirated away" data when he left, the court again declined to re-weigh evidence that the trial court had seen in rendering its judgment.¹²¹ In short, while the record reflected quite a range of information to which Rossi had access, that access by itself was not sufficient to present a case of misappropriation, particularly where the defendant presented evidence of his actions and knowledge which the trial court examined and apparently found credible. Without a finding that the information allegedly taken was a trade secret, and with the lack of evidence of an affirmative action to misappropriate information, there was no likelihood of success on the merits of the trade secret claim at trial, and accordingly no injunction would issue.

IV. *KEATON AND KEATON V. KEATON*: TRADEMARK AND UNFAIR COMPETITION

As a follow-up to a case reviewed in last year's survey,¹²² the Indiana Supreme Court heard argument in the case of *Keaton & Keaton v. Keaton*,¹²³ an unfair competition case filed by one law firm against another concerning the firms' names.¹²⁴ The court of appeals had previously affirmed a trial court ruling rejecting the plaintiff's claims and allowing each firm to continue using its name. In particular, the court of appeals decided that the plaintiff firm had failed to provide evidence of a likelihood of confusion, and held that an unfair competition cause of action required a showing of the defendant's "subjective intent to deceive" the consumer.¹²⁵

The Indiana Supreme Court upheld the lower court's grant and sustaining of summary judgment against the plaintiff, but disagreed on some of the reasoning.¹²⁶ Consequently, the court took a short but instructive trip through

118. *Id.* at 1078.

119. *Id.*

120. *Id.*

121. *Id.* at 1078-79.

122. See Brown, *supra* note 85, at 1140-43.

123. 842 N.E.2d 816 (Ind. 2006).

124. See *id.* at 819.

125. *Id.*

126. *Id.*

aspects of unfair competition law, at least as it applies to names. Because the complaint alleged that the defendant's name might "pass off" its services for those of the plaintiff, the court began by reviewing the tort of "passing off" or "palming off," where liability arises for "intentional misrepresentation of goods or services as those of another."¹²⁷ Characterizing "passing off" as "nothing more than a subspecies of fraud," for which (like common law fraud) a showing of intentional deception was required, the court agreed with the summary judgment because it was conceded that no intentional misrepresentation had occurred.¹²⁸ This holding is of interest insofar as it requires a relatively high intent element for "passing off." In intellectual property parlance, commonly "passing off" and "trademark infringement" are considered much the same concept, and therefore if a junior user marks his or her goods or services with a name that is confusingly similar to a senior user's and distributes them in commerce, that is a sufficient "intent" for a case of "passing off" type of trademark infringement. The *Keaton* opinion, however, appears to take the view that a cause of action for "passing off" sounds more in the law of fraud than in the trademark law. As discussed below, the court also discussed principles of infringement of a trade name, and thus characterizing "passing off" as fraud seems not to limit a plaintiff's rights or options in a lawsuit in a practical sense. It does appear at least to change the usage of some of the language.

Moving to a consideration of "trade name infringement," the court called it also a subspecies of the tort of unfair competition, quoting with approval a prior Indiana Court of Appeals holding calling unfair competition much broader than simply palming off, and including such acts as interference with contract or business relationship and predatory pricing under the "unfair competition" heading.¹²⁹ Trade name infringement, the court stated, is the more accurate name for use of confusing similar corporate, business or professional names.¹³⁰ The court adopted the definition of "trade name" in the Restatement (Third) of Unfair Competition, and gave the common law cause of action as use of a trade name that is likely to cause confusion as to source of goods or products, irrespective of the defendant's subjective intent.¹³¹

The supreme court thus disagreed with the court of appeals' determination that intent was an element of common law trade name infringement, but nonetheless agreed with the affirmance of the summary judgment against the plaintiff.¹³² It based that conclusion on the plaintiff's lack of a protectable trade name.¹³³ While at common law, the court said, everyone had that right to use his or her name in business, "[m]odern authority holds that a trade name, including

127. *Id.*

128. *Id.* at 819-20.

129. *Id.* at 820 (citing *Bartholomew County Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353, 358 (Ind. Ct. App. 1988)).

130. *Id.*

131. *Id.* (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 12 (1995)).

132. *Id.* at 820-21.

133. *Id.*

a personal name, is protectable if it is distinctive.”¹³⁴ Still relying on the Restatement, the court’s next logical step was to require proof of secondary meaning to accord protection to a personal name as a trademark or a trade name. Evidence that the name has come to be “uniquely associated with a particular business through use” is required for secondary meaning,¹³⁵ and the burden on one attempting to prove secondary meaning is even higher where the alleged infringer is using his or her own name.¹³⁶ Because the court viewed the evidence of record as not meeting that burden, the plaintiff had no protectable trade name, and the summary judgment against the plaintiff was upheld.¹³⁷

This case is instructive for the Indiana practitioner and businessperson for two reasons. First, the opinion provides the Indiana Supreme Court’s most definitive (and certainly the first in many years) views on unfair competition in general, and trademark or trade name infringement in particular. Its statement that the tort of unfair competition is broader than commonly thought is not a new concept,¹³⁸ but its extension as an umbrella over both trademark or trade name infringement and varieties of fraud in the conduct of business may be a new characterization. Whether that umbrella characterization is particularly useful or not is an open question. A cause of action for “unfair competition” would seem to be made simply by proving acts in a business environment “unfair,” yet there are still individual elements of infringement, fraud, or other acts that must be proven. Use of the term “unfair competition” thus does not seem to make the law any clearer.

The heavy reliance on the Restatement and cases decided by the United States Court of Appeals for the Seventh Circuit in this opinion certainly indicates some likelihood of later reliance by Indiana courts on those same sources in deciding other issues of unfair competition. Further, a cause of action for “passing off” requires subjective intent to deceive, while a cause of action for trademark or trade name infringement does not. Other than the possibility of increased relief simply by virtue of intentional conduct, it is not clear what benefit might be gained by alleging “passing off” rather than infringement. Perhaps for that reason alone the twilight of the “passing off” tort is upon us.

Somewhat more importantly, at least in an academic sense and likely in a practical sense as well, the Indiana Supreme Court essentially equates a “trade name” with a “trademark” in this case. Both protectability and infringement standards identified by the court in the context of trade name infringement are identical or similar to those for trademarks, at least under the common law. Certainly at least one difference remains, and that is between the definitions of trademark and trade name. The former must be used on goods or services so as to indicate the source, and the latter must be used so as to indicate the business.

134. *Id.* at 821.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See Bartholomew County Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353 (Ind. Ct. App. 1988).

The Indiana Trademark Act¹³⁹ differentiates between trademarks and trade names,¹⁴⁰ prevents registration of a new trademark over a confusingly similar trade name in prior use,¹⁴¹ and prevents adoption of a trade name that would dilute a famous trademark.¹⁴² Nevertheless, the common law protection for trade names appears, in light of *Keaton and Keaton*, to be practically coextensive with common law protection for trademarks.

139. IND. CODE § 24-2-1-0.5-15.3 (2004).

140. *Id.* § 24-2-1-2.

141. *Id.* § 24-2-1-3(6).

142. *Id.* § 24-2-1-13.5(b).

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2006 survey period¹ was important for Indiana judges and product liability practitioners, particularly because of some insightful and well-reasoned decisions by the Indiana Supreme Court and the Seventh Circuit Court of Appeals. In the twelve years since the Indiana General Assembly amended the Indiana Product Liability Act (“IPLA”)² in 1995, Indiana judges and product liability practitioners have made significant progress in refining its scope. The 2006 survey period was no different.

This survey does not attempt to address in detail all of the cases decided during the survey period that Indiana product liability practitioners might find interesting.³ Rather, it examines selected cases that address important,

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1. The survey period is October 1, 2005, to September 30, 2006, though there are a few cases that this survey article addresses that courts decided after September 30, 2006.

2. This survey article follows the lead of the Indiana General Assembly and employs the term “product liability” (not “products liability”) when referring to actions governed by the IPLA.

3. Courts issued several important opinions in cases in which the theory of recovery was related to or in some way based upon “product liability” principles but the appellate issue did not involve a question implicating substantive Indiana product liability law. Those decisions are not addressed in detail here because of space constraints even though they may be interesting to Indiana product liability practitioners. *See* Maroules v. Jumbo, Inc., 452 F.3d 639 (7th Cir. 2006) (deciding *res ipsa loquitur* and related evidentiary issues); Patrick Indus., Inc. v. ADCO Products, Inc., No. 3:05cv0616 AS, 2006 WL 2579642 (N.D. Ind. Sept. 5, 2006) (determining the burden imposed by Federal Civil Procedure Rule 56 to defeat application of statute of limitations); Thornburg v. Stryker Corp., No. 1:05-cv-1378-RLY-TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006) (burden imposed by Federal Civil Procedure Rule 56 to show that a defendant sold, leased, or otherwise placed an allegedly defective product into the stream of commerce); Downey v. Union Pac. R.R., 411 F. Supp. 2d 977 (N.D. Ind. 2006) (reviewing the negligence duty associated with supplier of chattel); Parks v. Guidant Corp., 402 F. Supp. 2d 964 (N.D. Ind. 2005) (federal officer removal); Glotzbach v. Froman, 854 N.E.2d 337 (Ind. 2006) (analyzing the relationship between workers’ compensation recovery and necessity of proving a product liability case); Alli v. Eli Lilly & Co., 854 N.E.2d 372 (Ind. Ct. App. 2006) (applying Michigan substantive product liability law after

substantive product liability issues. This survey also provides some background information, context, and commentary when appropriate.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978. It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended it to apply only to strict liability actions.⁴ In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.⁵

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.⁶ The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of the statutes governing civil practice.

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, "regardless of the substantive legal theory or theories upon which the action is brought."⁷ When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant who is a user or consumer and is also "in the class of persons that the seller should reasonably foresee as being subject to the harm caused";⁸ (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";⁹ (3) "physical harm caused

determining Indiana substantive product liability law did not apply); *Bridgestone Ams. Holding, Inc. v. Mayberry*, 854 N.E.2d 355 (Ind. Ct. App. 2006) (deciding issues involving jurisdiction and extent of protective order); *Faris v. AC&S, Inc.*, 842 N.E.2d 870 (Ind. Ct. App. 2006) (deciding procedural and loss of consortium issues).

In addition, because product liability cases often turn on the admissibility, credibility, and persuasiveness of expert opinion witnesses, *Ervin v. Johnson & Johnson, Inc.*, No. 2:04CV0205-JDT-WGH, 2006 WL 1529582 (S.D. Ind. May 30, 2006), is likewise a case in which product liability practitioners may be interested.

4. Act of Apr. 21, 1983, 1983 Ind. Acts 1814.

5. Act of Apr. 26, 1995, 1995 Ind. Acts 4051. See *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

6. The current version of the IPLA is found in Indiana Code sections 34-20-1-1 to -9-1.

7. IND. CODE § 34-20-1-1 (2004).

8. Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." Indiana Code section 34-20-2-1(1) requires that IPLA claimants be in the "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."

9. Indiana Code section 34-20-1-1(a) identifies proper IPLA defendants as "manufacturers" or "sellers." Indiana Code section 34-20-2-1(2) provides the additional requirement that such a manufacturer or seller also be "engaged in the business of selling the product," effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability.

by a product”;¹⁰ (4) a product that is in a “defective condition unreasonably dangerous to [a] user or consumer” or to his property;¹¹ and (5) a product that “reach[ed] the user or consumer without substantial alteration in [its] condition.”¹² Indiana Code section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements, “regardless of the substantive legal theory or theories upon which the action is brought.”¹³

A. “User” or “Consumer”

The language the General Assembly employs in the IPLA is very important when it comes to who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.” For purposes of the IPLA, “consumer” means:

- (1) a purchaser;
- (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
- (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.¹⁴

“User” has the same meaning as “consumer.”¹⁵ Several published decisions

10. IND. CODE § 34-20-1-1(3) (2004).

11. *Id.* § 34-20-2-1.

12. *Id.* § 34-20-2-1(3). Indiana Pattern Jury Instruction 7.03 sets out a plaintiff’s burden of proof in a product liability action. It requires a plaintiff to prove each of the following propositions by a preponderance of the evidence:

1. The defendant was a manufacturer of the product [or the part of the product] alleged to be defective and was in the business of selling the product;
2. The defendant sold, leased, or otherwise put the product into the stream of commerce;
3. The plaintiff was a user or consumer of the product;
4. The product was in a defective condition unreasonably dangerous to users or consumers (or to user’s or consumer’s property);
5. The plaintiff is in a class of persons the defendant should reasonably have foreseen as being subject to the harm caused by the defective condition;
6. The product was expected to and did reach the plaintiff without substantial alteration of the condition in which the defendant sold the product;
7. The plaintiff or the plaintiff’s property was physically harmed; and
8. The product was a proximate cause of the physical harm to the plaintiff or the plaintiff’s property.

13. IND. CODE § 34-20-1-1 (2004).

14. *Id.* § 34-6-2-29.

15. *Id.* § 34-6-2-147.

in recent years construe the statutory definitions of “user” and “consumer.”¹⁶

A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined “user” or “consumer,” he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the “user” or “consumer” also be “in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.”¹⁷ Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken. In that regard, the IPLA does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product’s defective condition if that claimant falls outside of the IPLA’s definition of “user” or “consumer.”

On February 7, 2006, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (West Virginia), Inc.*,¹⁸ further defining and narrowing who qualifies as a “user” or “consumer” for purposes of bringing an action under the IPLA. In that case, Daniels Company (“Daniels”) designed and built a coal preparation plant at a facility owned by Solar Sources, Inc. (“Solar”).¹⁹ Part of the design involved the installation of a heavy media coal sump.²⁰ An out-of-state steel company manufactured the sump that Daniels designed and sent it, unassembled, to the facility.²¹

Stephen Vaughn worked for the construction company that Daniels hired to install the sump.²² During the installation process, Vaughn climbed onto the top of the sump to help connect a pipe. The chain he was using to secure the pipe in

16. See *Butler v. City of Peru*, 733 N.E.2d 912, 919 (Ind. 2000) (mentioning that a maintenance worker could be considered a “user or consumer” of an electrical transmission system because his employer was the ultimate user and he was an employee of the “consuming entity”); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 279 (Ind. 1999) (holding that a “user or consumer” includes a distributor who uses the product extensively for demonstration purposes). For a more detailed analysis of *Butler*, see Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001). For a more detailed analysis of *Estate of Shebel*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-36 (2000).

17. Indiana Code section 34-20-2-1 imposes liability when

a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.

18. 841 N.E.2d 1133 (Ind. 2006).

19. *Id.* at 1136.

20. *Id.*

21. *Id.*

22. *Id.*

place gave way, causing Vaughn to fall and sustain injuries.²³ Vaughn did not wear his safety belt when he climbed onto the sump.²⁴

Vaughn and his wife sued Daniels, alleging, among other things, “negligent design, manufacturing, and maintenance of the sump and the processing plant,” as well as a “strict liability” claim. The trial court granted summary judgment to Daniels, concluding that Daniels owed no duty of care to Vaughn and that Vaughn was not a “user” or “consumer” under the IPLA.²⁵ The court of appeals affirmed summary judgment for Daniels on the negligence claim, but reversed on the product liability claim based upon an expansive view of the terms “user” and “consumer.”²⁶

The Indiana Supreme Court held that Daniels could not be liable under the IPLA because Vaughn was not a “user” or “consumer.”²⁷ Vaughn could not be considered either a purchaser of the sump or a person “acting for or on behalf of the injured party.”²⁸ Although the *Vaughn* court recognized that “use” of a product might include “installation or assembly” if the manufacturer intends the product “to be delivered to the ultimate purchaser in an unassembled state,” such was not the case here because Solar ordered an “assembled and installed product.”²⁹ Because the “product” was not assembled and installed at the time of Vaughn’s accident, “neither Vaughn nor anyone else was a user of the product at the time it was still in the process of assembly and installation.”³⁰

Practitioners should recognize here that the court addresses Vaughn’s design defect product liability claim against Daniels as if it was a “strict liability” claim.³¹ The court’s unfortunate use of the term “strict liability” in such a context might confuse those who seek to interpret the opinion consistent with the IPLA’s requirements. To the extent that Vaughn asserted a product liability claim employing a design defect theory, it is not a “strict liability” claim because the IPLA requires Vaughn to prove, among other things, that Daniels “failed to exercise reasonable care under the circumstances in designing the product.”³²

23. *Id.*

24. *Id.*

25. *Id.*

26. *Vaughn v. Daniels Co. (W. Va.), Inc.*, 777 N.E.2d 1110, 1139 (Ind. Ct. App. 2002), *clarified on reh’g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003), *vacated*, 841 N.E.2d 1133 (Ind. 2006). For a more detailed analysis of the court of appeals’ decision in *Vaughn*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L. REV. 1247, 1250-57 (2004).

27. *Vaughn*, 841 N.E.2d at 1133.

28. *Id.* at 1139.

29. *Id.*

30. *Id.*

31. *Id.* at 1138-43.

32. See IND. CODE § 34-20-2-2 (2004); see also *infra* notes 71-76 and accompanying text.

B. “Manufacturer” or “Seller”

For purposes of the IPLA, “[m]anufacturer” . . . means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.”³³ “‘Seller’ . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.”³⁴ Indiana Code section 34-20-2-1(2) employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless “the seller is engaged in the business of selling the product.”³⁵

Sellers can be held liable as manufacturers in two ways. First, if the seller fits within Indiana Code section 34-6-2-77(a)’s definition of “manufacturer,” which expressly includes a seller who:

(1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process; (3) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the manufacturer.³⁶

Second, a seller can be deemed a statutory “manufacturer” and, therefore, be held liable to the same extent as a manufacturer in one other limited circumstance. Indiana Code section 34-20-2-4 provides that a seller may be deemed a “manufacturer” “[if the] court is unable to hold jurisdiction over a particular manufacturer” and if the seller is the “manufacturer’s principal distributor or seller.”³⁷

33. IND. CODE § 34-6-2-77 (2004).

34. *Id.* § 34-6-2-136.

35. *Id.* § 34-20-2-1(2); *see, e.g., Williams v. REP Corp.*, 302 F.3d 660, 663 (7th Cir. 2002) (recognizing that Indiana Code § 33-1-1.5-2(3), the predecessor to Indiana Code § 34-20-2-1, imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a “manufacturer” or “seller”); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730, 745 (N.D. Ind. 2002) (holding that although the defendant provided some technical guidance or advice relative to ponds at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem it a “manufacturer” of the plant); *see also Joseph R. Alberts & James M. Boyers, Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1170-72 (2003).

36. IND. CODE § 34-6-2-77(a).

37. *Id.* § 34-20-2-4. *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressing the circumstances

There is one other important provision about which practitioners must be aware when it comes to liability of “sellers” under the IPLA. When the theory of liability is based on “strict liability in tort,”³⁸ Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller” and cannot be deemed a “manufacturer” is not liable and is not a proper IPLA defendant.³⁹

Thornburg v. Stryker Corp.,⁴⁰ is the only published decision from the survey period addressing whether or not a particular defendant is, in fact, a manufacturer or seller under the IPLA. In that case, the plaintiff, Vickie Thornburg, underwent hip replacement surgery and subsequently filed product liability and medical malpractice claims against defendants Stryker Corporation (“Stryker”) and Howmedica Osteonics Corp. d/b/a Stryker Orthopaedics (“HOC”).⁴¹ Stryker moved for summary judgment, contending that it did not manufacture or sell the

under which entities may be considered “manufacturers” or “sellers” under the IPLA. *See also* *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070, at *14-*15 (S.D. Ill. Jan. 8, 2002). The court, applying Indiana law, examined the “unable to hold jurisdiction over” requirement of Indiana Code section 34-20-2-4. *Id.* at *9. The plaintiff assumed that “jurisdiction” refers to the power of the court to hear a particular case. The defendant argued that the phrase equates to “personal jurisdiction.” The court refused to resolve the issue, deciding instead to simply deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Id.* at *14-*15.

38. The phrase “strict liability in tort,” to the extent that the phrase is intended to mean “liability without regard to reasonable care,” appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard, not a “strict liability” standard.

39. IND. CODE § 34-20-2-3 (2004). In *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), the court cited what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer. *Id.* at 725-26. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels) and because Glidden did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* There is an omission in the *Ritchie* court’s citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: “[A] product liability action [based on the doctrine of strict liability in tort] may not be commenced or maintained.” *Id.* at 725 (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. Indiana Code section 34-20-2-2 makes it clear that “liability without regard to the exercise of reasonable care” (strict liability) applies now only to product liability claims alleging a manufacturing defect theory. Claims alleging design or warning defect theories are controlled by a negligence standard. *See, e.g.,* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002); *see also* *Alberts & Boyers*, *supra* note 35, at 1173-75.

40. No. 1:05-CV-1378-RLY-TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006).

41. *Id.* at *1.

device that Thornburg alleged caused her injuries.⁴² Thornburg cited only Stryker's status as HOC's parent company to support her claims against Stryker.⁴³ According to the court, such evidence "alone is ineffectual because it ignores the 'general principle of corporate law . . . that a parent corporation . . . is not liable for the acts of its subsidiaries.'"⁴⁴ The record was otherwise "bereft of any evidence that Stryker sold, leased, or otherwise placed the allegedly defective hip replacement system into the stream of commerce."⁴⁵ Consequently, the court held that Thornburg's evidence did not satisfy her summary judgment burden and granted summary judgment in Stryker's favor.⁴⁶

*Fellner v. Philadelphia Toboggan Coasters, Inc.*⁴⁷ also addressed the extent to which a plaintiff could maintain a product liability claim against a defendant. In that case, Tamara Fellner was killed when she was ejected from a wooden roller coaster train operated as an attraction at Holiday World, an amusement park in southern Indiana.⁴⁸ Defendant Philadelphia Toboggan Coasters, Inc. ("PTC") developed and manufactured the cars.⁴⁹ Defendant Koch Development Corp. ("Koch") owns and operates both Holiday World and the roller coaster involved.⁵⁰ The personal representative of Fellner's estate sued PTC for "the design and manufacture of the cars" and also sued Koch "for the operation of the roller coasters."⁵¹ Plaintiff sought to "hold Koch liable for negligence, strict liability, and breach of implied warranties."⁵²

Arguing that it was not a "seller" of a product for purposes of the IPLA, Koch moved to dismiss the plaintiffs' strict liability and breach of implied warranties against it, as well as plaintiffs' punitive damages claims.⁵³ The court agreed that those claims should be dismissed.⁵⁴ There is no doubt that plaintiff sought by the so-called "strict liability" count to pursue Koch based upon

42. *Id.*

43. *Id.* at *4.

44. *Id.* (quoting *United States v. Bestfoods*, 524 U.S. 51, 60 (1998)).

45. *Id.*

46. *Id.*

47. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006).

48. *Id.* at *1.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The negligence claim against Koch appeared to assert that Koch: "(1) failed to ensure that Fellner was safely and properly secured by the restraints . . . ; (2) failed to properly hire, train and supervise ride attendants; and (3) failed to properly test, inspect, and maintain the restraints." *Id.* The so-called "strict liability" claim appeared to assert that Koch failed to "provide proper and adequate warnings" about the roller coaster. *Id.* There was also an allegation that Koch "failed to comply with local, state, and federal regulations, ordinances, rules, and statutes applicable to amusement park rides[.]" *Id.* It was difficult to determine whether such an allegation was intended to support an IPLA-based theory of recovery or a common law negligence theory of recovery.

53. *Id.*

54. *Id.* at *4.

manufacturing and warning defect theories. As such, those allegations are covered by the IPLA because they arise out of physical harm a product (the roller coaster in this case) caused. The IPLA, however, does not permit Koch to be sued under its provisions for physical harm caused by the roller coaster car because it was not the “seller” of the car at issue. Citing *Marsh v. Dixon*,⁵⁵ the court determined that an “an amusement park [that] sells tickets to individual purchasers is not the ‘seller’ of a product for purposes of the [IPLA].”⁵⁶

It is important for the sake of clarity to point out that the *Fellner* decision employs the term “strict liability” as if it is synonymous with all IPLA-based product liability claims. It may have done so because plaintiff pursued a self-styled “strict liability” count against Koch based upon both manufacturing and warning defects. Regardless, as Indiana Code section 34-20-2-2 makes clear, product liability claims relying upon an improper design or inadequate warning theory of recovery must be evaluated using a negligence standard. Warning defect claims are not subject to “strict” liability to the extent that “strict” liability means liability absent the exercise of “all reasonable care in the manufacture and preparation of the product” (i.e., liability without “fault”).⁵⁷ Accordingly, regardless whether Koch was a seller of the roller coaster, plaintiff could not pursue a “strict liability” claim against Koch based upon a warning defect theory in the first instance because such claims require proof of negligence and are not “strict” in the sense that liability can be proved without regard to fault.

C. Physical Harm Caused by a Product

For purposes of the IPLA, “physical harm” means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”⁵⁸ It does not include “gradually evolving damage to property or economic losses from such damage.”⁵⁹

For purposes of the IPLA, “product” means “any item or good that is

55. 707 N.E.2d 998, 1001-02 (Ind. Ct. App. 1999).

56. *Fellner*, 2006 WL 2224068 at *4.

57. IND. CODE § 34-20-2-2 (2004); *see infra* notes 71-76 and accompanying text.

58. IND. CODE § 34-6-2-105(a) (2004).

59. *Id.* § 34-6-2-105(b); *see, e.g.,* *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 493 (Ind. 2001) (holding that “personal injury and damage to other property from a defective product are actionable under the [IPLA], but their presence does not create a claim under the Act for damage to the product itself”); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 486 (Ind. 2001) (holding that there is no recovery under the IPLA where a claim is based on damage to the defective product itself); *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (denying a motion to dismiss a case determining that Indiana recognizes that pregnancy may be considered a “harm” in certain circumstances); *see also* *Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc.*, No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830, at *2 (S.D. Ind. Apr. 29, 2002) (holding that there was no recovery under the IPLA in a case involving a motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

personalty at the time it is conveyed by the seller to another party.”⁶⁰ “The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”⁶¹

D. Defective and Unreasonably Dangerous

Only products that are in a “defective condition” are ones for which IPLA liability may attach.⁶² For purposes of the IPLA, a product is in a “defective condition”

if at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.⁶³

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.⁶⁴

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect in its design (a “design defect”); (2) the product lacks adequate or appropriate warnings (a “warnings defect”); or (3) the product has a defect that is the result of a malfunction or impurity in the manufacturing process (a “manufacturing defect”).⁶⁵

60. IND. CODE § 34-6-2-114(a) (2004).

61. *Id.* § 34-6-2-105(b).

62. *Id.* § 34-20-2-1(1); *see also* *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No. 2:03-cv-178-TS, 2006 WL 3147710 at *5 (N.D. Ind., Oct. 31, 2006).

63. IND. CODE § 34-20-4-1 (2004).

64. *See Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003) (“[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous.” (citing *Cole v. Lantis Corp.*, 714 N.E.2d 194, 198 (Ind. Ct. App. 1999))).

65. *See First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 (7th Cir. 2004); *Westchester Fire Ins.*, 2006 WL 3147710 at *5; *Baker*, 799 N.E.2d at 1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997). *Troutner v. Great Dane Ltd. Partnership*, No. 2:05-CV-040-PRC, 2006 WL 2873430 (N.D. Ind. Oct. 5, 2006), provides additional authority confirming that a plaintiff’s product liability claim will fail as a matter of law if he or she does not articulate a legitimate manufacturing, design, or warning defect. In that case, the plaintiff was a semi-truck driver who fell and suffered head injury when a grab bar mounted on his trailer gave way. *Id.* at *1. The plaintiff sued the companies that manufactured and sold the trailer and the grab bar, alleging that they placed a trailer with a grab bar into the stream of commerce in a defective and unreasonably dangerous condition. *Id.* The case was removed to federal court, and both manufacturing defendants moved for summary judgment, pointing out that plaintiffs’ own expert testified that the most likely cause of the failure of the grab bar was inadequate and negligent maintenance. *Id.* at *3. The plaintiff did not file a response to either

Although claimants are free to assert any of those three theories for proving that a product is in a “defective condition,” the IPLA provides explicit statutory guidelines identifying when products, as a matter of law, are not defective. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].”⁶⁶ In addition, Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”⁶⁷

In addition to the two specific statutory pronouncements identifying when a product is not “defective” as a matter of law, Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of the IPLA. A product is “unreasonably dangerous” only if its use “exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary consumer who purchases [it] with ordinary knowledge about the product’s characteristics common to the community of consumers.”⁶⁸ A product is not

motion. *Id.* at *1. Because, under such circumstances, no reasonable jury could find for plaintiff on the product liability claims, the court granted summary judgment. *Id.* at *3.

66. IND. CODE § 34-20-4-3 (2004). One recent case discussing “reasonably expectable use” is *Hunt v. Unknown Chemical Mfr. No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at *28-*32 (S.D. Ind. Nov. 5, 2003) (Homeowner tore down and burned a deck that was made from lumber treated with chromium copper arsenate. He then spread the ashes as fertilizer in the family garden. Judge Larry McKinney held that homeowner could not pursue product liability claim because his use of the lumber was not, legally speaking, foreseeable, intended, or expected.).

67. IND. CODE § 34-20-4-4.

68. *Id.* § 34-6-2-146; *see also Baker*, 799 N.E.2d at 1140; *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999). In *Baker*, a panel of the Indiana Court of Appeals wrote that “[t]he question whether a product is unreasonably dangerous is *usually* a question of fact that must be resolved by the jury.” 799 N.E.2d at 1140 (emphasis added). Those panels also seem to favor jury resolution in determining reasonably expected use. Indeed, the *Baker* opinion states that

reasonably expectable use, like reasonable care, involves questions concerning the ordinary prudent person, or in the case of products liability, the ordinary prudent consumer. The manner of use required to establish ‘reasonably expectable use’ under the circumstances of each case is a matter peculiarly within the province of the jury.

Id.

It would seem incorrect, however, to conclude from those pronouncements that there exists something akin to a presumption that juries always *should* resolve whether a product is unreasonably dangerous or whether a use is reasonably expectable. Indeed, recent cases have resolved the defective and unreasonably dangerous issue as a matter of law in a design defect context even in the presence of divergent expert testimony. In *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002), the plaintiff was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be in the installed position. With respect to the defective design claims, plaintiff’s expert opined that the saw was defective and unreasonably dangerous by its design, suggesting that the saw could be designed

unreasonably dangerous as a matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.⁶⁹

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a “defective condition,” recent decisions have quite clearly recognized that the substantive defect analysis (i.e., whether a design was inappropriate or whether a warning was inadequate) should *follow* a threshold analysis that first examines whether, in fact, the product at issue is “unreasonably dangerous.”⁷⁰

The IPLA provides that liability attaches for placing in the stream of commerce a product in a “defective condition”⁷¹ even though: “(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”⁷² What the IPLA bestows, however, in terms of liability despite the exercise of “all reasonable care [i.e., fault],” it then removes for design and warning defect cases, replacing it with a negligence

so that the guard could be attached without tools or that the tools could be physically attached to the saw. *Id.* at 900. The court rejected the claim, holding that the plaintiff and his expert had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.* See also *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *1-*4 (S.D. Ind. Oct. 15, 2002) (holding that Honeywell’s design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time the specifications were introduced into the stream of commerce).

69. See *Baker*, 799 N.E.2d at 1140; see also *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (writing that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability). An open and obvious danger negates liability. “To be unreasonably dangerous, a defective condition must be hidden or concealed [and] evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff’s prima facie case that the defect was hidden.” *Hughes v. Battenfeld Gloucester Eng’g Co.*, No. TH 01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at *7-*8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 199). In *Hughes*, the plaintiff injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station. Plaintiff admitted that he knew about the dangers associated with using the nip station because he observed co-workers who were injured performing similar tasks. *Id.* at *4. Plaintiff testified that he was aware of the alleged defect that caused his accident, and on two previous occasions he had filed written suggestions with his employer requesting that it reduce the risk of injury involved. *Id.* at *3-*4. Judge Tinder held that the dangerous condition of the nip station was open and obvious as a matter of law and entered summary judgment. *Id.* at *17.

70. Indeed, in *Bourne v. Marty Gilman, Inc.*, No. 1:03-CV-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1 (S.D. Ind. July 20, 2005), *aff’d* 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect) and *Conley v. Lift-All Co.*, No. 1:03-CV-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *1 (S.D. Ind. July 25, 2005) (involving an alleged warnings defect), Judge Hamilton followed that precise approach.

71. IND. CODE § 34-20-2-1(1) (2004).

72. *Id.* § 34-20-2-2.

standard:

[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.⁷³

The statutory language is, therefore, clear; it imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the “exercise of all reasonable care”) only for those claims relying upon a manufacturing defect theory.⁷⁴ Thus, just as in any other negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements—duty, breach, injury, and causation.⁷⁵ Despite the IPLA’s unambiguous language and several years worth of authority recognizing that “strict liability” applies only in cases involving alleged manufacturing defects, some courts unfortunately continue to employ the term “strict liability” when referring to IPLA claims, even when those claims allege warning and design

73. *Id.*

74. *See Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (7th Cir. 2005) (“Under Indiana’s products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design.”); *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.4 (7th Cir. 2004) (“Both Indiana’s 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles.”); *Conley*, 2005 U.S. Dist. LEXIS 15468, at *12-*13 (“The IPLA effectively supplants [the plaintiff’s] common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff’s common law claims will therefore be treated as merged into the IPLA claims.”); *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 (“[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence.”), *aff’d* 452 F.3d 632 (7th Cir. 2006); *see also Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003); *Miller v. Honeywell Int’l Inc.*, No. IP 9-1742-C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002), *aff’d*, 2004 U.S. Dist. LEXIS 15261 (7th Cir. 2004); *Burt v. Makita, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002).

75. *E.g., Conley*, 2005 U.S. Dist. LEXIS 15468, at *13-*14 (“To withstand summary judgment, [the plaintiff] must come forward with evidence tending to show: (1) Lift-All had a duty to warn the ultimate users of its sling that dull or rounded load edges could cut an unprotected sling; (2) the hazard was hidden and thus the sling was unreasonably dangerous; (3) Lift-All failed to exercise reasonable care under the circumstances in providing warnings; and (4) Lift-All’s alleged failure to provide adequate warnings was the proximate cause of his injuries.”).

defects and clearly accrued after the 1995 amendments took effect.⁷⁶

1. *Design Defect Theory*.—Decisions that address substantive design defect allegations in Indiana require plaintiffs to prove the existence of what practitioners and judges often refer to as a “safer, feasible alternative” design.⁷⁷ Plaintiffs must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.⁷⁸ One panel of the Seventh Circuit (Judge Easterbrook writing) has described that a “design-defect claim in Indiana is a negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents.”⁷⁹ Stated in a slightly different way, “[t]he [p]laintiff bears the burden of proving a design to be unreasonable, and must do so by showing there are other safer alternatives, and that the costs and benefits of the safer design make it unreasonable to use the less safe design.”⁸⁰

Indiana’s requirement of proof of a safer, feasible alternative design is similar to what a number of other states require in the design defect context. Indeed, that requirement is reflected in Section 2(B) of the Restatement (Third) of Torts and the related comments.⁸¹ In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard.⁸² As such, a claimant can hardly find a manufacturer negligent for adopting a particular design unless he or she can prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. The claimant must prove that the safer, feasible alternative design was in fact

76. *E.g.*, *Burt*, 212 F. Supp. 2d at 900; *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *see also* *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1138 (Ind. 2006) (cause of action accrued on December 12, 1995); *Fellner v. Philadelphia Toboggan Coasters, Inc.*, No. 3:05-CV-218-SEB-WGH, 2006 WL 2224068, at *1, *4 (S.D. Ind. Aug. 2, 2006) (cause of action accrued on May 31, 2003); *Cincinnati Ins. Cos. v. Hamilton Beach/Proctor Silex, Inc.*, No. 4:05 CV 49, 2006 WL 299064, at *2-*3 (N.D. Ind. Feb. 7, 2006) (cause of action accrued on June 30, 2003).

77. In cases alleging improper design to prove that a product is in a “defective condition,” the substantive defect analysis may need to follow a threshold “unreasonably dangerous” analysis if one is appropriate. *E.g.*, *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *10-*20.

78. *See Burt*, 212 F. Supp. 2d at 900; *Whitted*, 58 F.3d at 1206.

79. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

80. *Westchester Fire Ins. Co. v. Am. Wood Fibers, Ind.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006). Another recent Seventh Circuit case postulates that a design defect claim under the IPLA requires “applying the classic formulation of negligence: B [burden of avoiding the accident] < P [probability of the accident that the precaution would have prevented] L [loss that the accident if it occurred would cause].” *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 637 (7th Cir. 2006). *See* *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Judge Learned Hand’s articulation of the “B<PL” negligence formula).

81. RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

82. Ind. Code § 34-20-2-2 (2004); *see also Bourne*, 452 F.3d at 637; *Westchester Fire Ins.*, 2006 WL 3147710, at *5.

available and that the manufacturer unreasonably failed to adopt it.⁸³

In addition, the IPLA adopts comment k of the Restatement (Second) of Torts for all products and, by statute, “[a] product is not defective . . . if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”⁸⁴ Thus, a manufacturer technically cannot make the “comment k” statutory defense available until and unless the claimant demonstrates a rebuttal to it. That raises interesting questions in light of Indiana’s quirky treatment of Trial Rule 56 under *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*⁸⁵ In federal court under a *Celotex*⁸⁶ standard, a manufacturer may file a summary judgment motion based upon the “comment k” defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design. Under Indiana’s treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design.⁸⁷ Regardless of the procedure governing the motion itself, the claimant still must prove the existence of a safer, feasible alternative design to rebut the IPLA’s “comment k” defense.⁸⁸

During the 2006 survey period, the Indiana Supreme Court, in *Schultz v. Ford Motor Co.*,⁸⁹ endorsed the foregoing burden of proof analysis in design defect claims in Indiana.⁹⁰

State and federal courts applying Indiana law have been busy in recent years addressing design defect claims.⁹¹ Federal courts issued two important opinions

83. To excuse that requirement would be tantamount to excusing the reasonable care statutory component of design defect liability. By way of example, a manufacturer could not be held liable under the IPLA for adopting design “A” unless there was proof that through reasonable care the manufacturer would have instead adopted design “B.” To make that case, a claimant must show the availability of design “B” as an evidentiary predicate to establish before proceeding to the other “reasonable care” elements.

84. IND. CODE § 34-20-4-4 (2004).

85. 644 N.E.2d 118 (Ind. 1994).

86. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

87. IND. R. PROC. 56.

88. *E.g.*, *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt v. Makita, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002); *see also Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 637 (7th Cir. 2006); *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998); *Westchester Fire Ins. Co. v. Am. Wood Fibers, Ind.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006).

89. 857 N.E.2d 977 (Ind. 2006).

90. *Id.* at 986 n.12 (For a discussion of the burden of proof at summary judgment in a design defect claim, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 39 IND. L. REV. 1145, 1158-60 (2006)).

91. *See Lytle v. Ford Motor Co.*, 814 N.E.2d 301 (Ind. Ct. App. 2004) (An Indiana Court of Appeals panel held, among other things, that the theories offered by plaintiffs’ opinion witnesses regarding the inadvertent unlatching of a seatbelt were not reliable and that designated evidence failed to show that Ford’s seatbelt design was defective or unreasonably dangerous.); *Baker v.*

during the survey period in design defect cases. In the first case, *Bourne v. Marty Gilman, Inc.*,⁹² the United States Court of Appeals for the Seventh Circuit held that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law.⁹³ *Bourne* is a significant decision for Indiana product liability practitioners because, as discussed below, it reinforces at least four important precepts: (1) “defective condition” and “unreasonably dangerous” are not interchangeable terms; (2) the concept of “open and obvious” remains relevant in Indiana product liability law even though it is no longer a stand-alone defense; (3) whether a product presents an unreasonable danger can and should, under the proper circumstances, be decided by a judge as a matter of law; and (4) a claimant’s expert testimony must be sufficient, even at summary judgment stage, to satisfy Indiana’s safer, feasible alternative design requirement in cases in which the claimant pursues a design defect claim.

Plaintiff Andrew Bourne suffered leg and spinal injuries after the Ball State University football team won an upset victory in October 2001.⁹⁴ After the game, fans rushed the field to celebrate, eventually pulling, climbing upon, and rocking one of the goal posts in an effort to bring it down.⁹⁵ Bourne said that he walked under the goal post and jumped up to grab it, but missed.⁹⁶ He then started walking toward the other end of the field when he heard a snap and felt the impact across his back.⁹⁷

Bourne and his parents sued the goal post manufacturer, Marty Gilman, Inc. (“Gilman”), arguing that the goal post was unreasonably dangerous and defective.⁹⁸ Gilman moved for summary judgment, contending that the risk the goal post presented was obvious.⁹⁹ Gilman’s evidence acknowledged that the company has known that fans sometimes tear down goal posts.¹⁰⁰ Gilman’s evidence also established that the aluminum posts are about forty-feet tall and weigh 470 pounds, and that the structure is a so-called “slingshot” design with

Heye-Am., 799 N.E.2d 1135 (Ind. Ct. App. 2003) (An Indiana Court of Appeals panel held that fact issues precluded summary judgment with respect to, among other issues, whether the placement of, and lack of a guard for, a maintenance stop button rendered a glass molding machine defective or unreasonably dangerous or both.); *see also* Mesman v. Crane Pro Servs., 409 F.3d 846 (7th Cir. 2005).

92. 452 F.3d 632 (7th Cir. 2006).

93. *Id.* at 633, 638-39.

94. *Id.* at 633. The district court’s analysis of the facts surrounding the end of the game and the collapse of the goal post is a bit more detailed than the Seventh Circuit’s decision. *See Bourne v. Marty Gilman, Inc.*, No. 1:03-CV-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1-*4 (S.D. Ind. July 20, 2005).

95. *Bourne*, 2005 U.S. Dist. LEXIS 15467 at *4.

96. *Id.*

97. *Id.*

98. *Id.* at *1.

99. *Id.* at *10-*12.

100. *Id.*

one vertical support holding up the structure.¹⁰¹

The Bournes countered by submitting an affidavit of a safety engineer who testified that reasonable manufacturers should foresee that goal posts will be torn down by fans and that unwary fans' "lay knowledge of metallurgy lulls them into believing that goal posts fall gradually enough to permit a safe retreat."¹⁰² According to the court, the engineer "did not testify to any science on which he based his opinion."¹⁰³ Instead, his conclusions "apparently rested on availability of alternative designs[,] including "double-offset gooseneck," "hinged," and "fan-resistant" versions.¹⁰⁴ Those designs were more expensive than the Gilman slingshot style at issue.¹⁰⁵ The Bournes' engineer did not run any comparative tests using these other types of posts nor did he cite to any scientific data.¹⁰⁶ According to the court, the Bournes' engineer assumed for the sake of his opinion that more expensive alternatives would be safer.¹⁰⁷

Judge David Hamilton granted summary judgment for Gilman, determining as a matter of law that the goal post was not unreasonably dangerous because it was obvious to an objective, reasonable person that a goal post collapsing under the weight of celebrating fans poses a risk of serious injury.¹⁰⁸ The Bournes appealed to the Seventh Circuit, arguing that the "open and obvious" rule cannot bar a claim for defective design under the Indiana Product Liability Act ("IPLA"), even if a risk is obvious, if they could prove that Gilman should have

101. *Id.* The slingshot style goal post was introduced in 1969 to minimize the danger posed to players in the end zone by the older H-shaped goal posts, which had two vertical supports. *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 633-34 (7th Cir. 2006). Gilman did not design the slingshot-style goal posts, but instead bought the design in 1985. *Id.* at 634. At that time, Gilman switched to a different type of aluminum alloy to facilitate its manufacturing process. *Id.* Gilman admitted that it did not consider at that time any engineering controls to address hazards created by collapsing goal posts. *Id.*

102. *Id.* at 634. Plaintiffs' engineer compiled a non-exhaustive list of football games during which students tore down goal posts. *Id.* He also cited two newspaper articles reporting incidents of injury other than Bourne's, though he did not attempt to compile any statistics. *Id.*

103. *Id.* According to the court, plaintiffs' engineer "offered only speculation to support his premise that social and cultural pressure misleads the average fan into believing that goalposts collapse slowly enough that ripping them down is safe." *Id.* Although the engineer hinted that Gilman's "change in aluminum alloy in 1985 rendered the posts more dangerous, he cited no evidence comparing the posts before and after the change." *Id.*

104. *Id.* The "double-offset gooseneck" design reinforces the single vertical support with another support right next to it. *Id.* The "hinged" design permits the posts to be lowered after a game. *Id.* The "fan-resistant" or "indestructible" design is made out of steel. *Id.*

105. *Id.* The posts like the ones that injured Bourne cost \$4700 per pair. *Id.* Hinged posts cost \$6500. *Id.* "Indestructible" posts cost between \$23,000 and \$32,000. *Id.* The cost of the "double-offset gooseneck" design was not in the record. *Id.*

106. *Id.* According to the court, the engineer "presented just a few marketing materials distributed by makers of these alternative designs." *Id.*

107. *Id.*

108. *Id.* at 634-35.

adopted a safer, feasible alternative design.¹⁰⁹

The Seventh Circuit ultimately agreed that Judge Hamilton's ruling was sound, although it believed it more accurate to state that the goal post was not unreasonably dangerous as a matter of law, rather than declaring that the danger posed by it was obvious as a matter of law.¹¹⁰ In doing so, the Seventh Circuit made it clear that the case examined whether the product was defective and unreasonably dangerous as a matter of law, not whether the "incurred risk" defense applied as a matter of law.¹¹¹ This is an important distinction because the extent to which a product's risk is "open" or "obvious" is a critical element in determining both the reasonableness of the danger it presents and the degree to which a user actually knew of the product's danger.¹¹² The former, not the latter, determination was at issue in *Bourne*.¹¹³

The Seventh Circuit also rejected the Bournes' argument that the goal post was in a "defective condition" because it exposed Andrew to a greater risk than what he, as an ordinary consumer with ordinary knowledge, contemplated.¹¹⁴ With regard to that argument, the court held that "the Bournes must lose because they cannot show a defect with the evidence that they have adduced."¹¹⁵ In the court's view, the "fatal flaw" with the Bourne's argument was that their engineer's "mere conclusions" were the only evidence that the design was defective, and it was insufficient as a matter of law.¹¹⁶ In that regard, the court concluded:

[The engineer] offers only speculation that social pressure and publicity falsely assure [fans] that pulling down posts is safe. (Perhaps seeing the weakness, the Bournes contend simply that people would not rip down posts if they knew the risks.) . . . [The engineer's] suggestion that [Gilman's] change in aluminum alloy in 1985 made the product less safe is nothing but innuendo. [The engineer] does not provide a basis on which a finder of fact could evaluate the frequency of injuries caused by goalposts, or calculate the extent to which risk would actually be reduced by the alternative designs, or justify the cost of those alternatives relative

109. *Id.* at 635.

110. *Id.* at 637.

111. *Id.*

112. *Id.*

113. *Id.* The plaintiffs in *Bourne* relied on the Seventh Circuit's decision in *Mesman v. Crane Pro Services*, 409 F.3d 846 (7th Cir. 2005), for the proposition that Indiana law no longer permits a manufacturer to avoid liability in a design defect case simply because a defect is "open and obvious." The *Bourne* court was quick to distinguish *Mesman* as a case involving application of the "incurred risk defense," which Gilman did not plead nor argue in the case before it. *Bourne*, 452 F.3d at 636-37. For a discussion of precisely that distinction, see Alberts et al., *supra* note 90, at 1188-91.

114. *Bourne*, 452 F.3d at 637.

115. *Id.*

116. *Id.* at 638.

to the benefits of aluminum posts As if unaware of their burden, [plaintiffs] say neither statistics nor testing is required because the competitors actually sell safer (according to [the engineer]) posts (although they are 38% to 700% more expensive). But that will not do: mere existence of a safer product is not sufficient to establish liability Otherwise, the bare fact of a Volvo would render every KIA defective.¹¹⁷

In addition, the court pointed out that the engineer never considered the “possibility of unintended increase in risk to intended users, like the students or staff who would have to hurriedly lower the hinged post to police the crowd at the end of a game.”¹¹⁸ According to the *Bourne* court, such costs “of those incidental effects must be weighed in the balance After all, Indiana neither requires manufacturers to be insurers nor to guard against all risks by altering the qualities sought by intended users.”¹¹⁹

Bourne is a significant decision for Indiana product liability practitioners because it reinforces at least four important precepts. First, the Seventh Circuit in *Bourne*, as did Judge Hamilton, recognized that Indiana law requires a product liability plaintiff to show that the product at issue is both “in a defective condition” and that it is “unreasonably dangerous.”¹²⁰ The decision thus confirms that IPLA liability does not attach unless the defective condition arising from an improper design, an inadequate warning, or a manufacturing flaw *also* renders the product unreasonably dangerous.¹²¹

The second important precept *Bourne* confirms is that “open and obvious” danger remains relevant in Indiana product liability cases even though the 1995 amendments to the IPLA eliminated the so-called “open and obvious” defense. The *Bourne* court recognized,

Obviousness remains a relevant inquiry because . . . the question of what is unreasonably dangerous depends upon the reasonable expectations of consumers and expected uses.^[122] . . . In some cases, the obviousness of the risk will obviate the need for any further protective measures, or obviousness may prove that an injured user knew about a risk but nonetheless chose to incur it.¹²³

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 635-36 (citing *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998)); *Moss v. Crossman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998); *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003)).

121. *Id.*

122. *Id.* at 637 (citing IND. CODE §§ 34-20-4-1, 34-6-2-146 (2004)); *Mesman v. Crane Pro Servs.*, 409 F.3d 846, 850-51 (7th Cir. 2005); *FMC Corp. v. Brown*, 551 N.E.2d 444, 446 (Ind. 1990)).

123. *Id.* (citing *Mesman*, 409 F.3d at 850-51; *FMC Corp.*, 551 N.E.2d at 446).

Practitioners and judges in Indiana should be mindful that application of the “open and obvious” concept can be used in at least two different ways. *Bourne* demonstrates how that concept can be used and applied in determining unreasonable danger. The “open and obvious” concept also applies in the context of the IPLA’s “incurred risk” defense¹²⁴ even though it is correct to acknowledge, as did the *Bourne* court, that there is technically no longer a stand-alone “open and obvious” danger defense. Application of the “open and obvious” danger concept as part of a defendant’s “incurred risk” defense makes it more difficult for manufacturer defendants to achieve summary judgments largely because the defense requires a defendant to establish that the user actually knew of the product’s danger. No such requirement exists when the “open and obvious” concept is used to support the argument that a product is not unreasonably dangerous because of the open and obvious nature of the danger it presents.

The third important product liability precept that the *Bourne* decision reinforces is that judges can and should decide as a matter of law that a product is not “unreasonably dangerous” for purposes of IPLA liability when undisputed facts demonstrate that the risks it presents are objectively obvious. Indeed, as the *Bourne* court wrote, “[a]lthough obviousness typically factors in the equation for the jury . . . , there are some cases where the case is so one-sided that there is no possibility of the plaintiffs’ recovery.”¹²⁵

As was the case in the district court in *Bourne*, claimants seeking to avoid summary judgment often cite cases from twenty or thirty years ago to support the idea that whether a product is “unreasonably dangerous” is always a question for the jury and should not be decided by a judge as a matter of law. The Seventh Circuit in *Bourne* rejects that premise, pointing out that such a determination is inherently different from, for example, whether a case is one “in which no reasonable jury could find that the plaintiff was less responsible for his own injury than others were[.]”¹²⁶

The fourth precept *Bourne* confirms is that a claimant’s expert testimony must be sufficient, even at summary judgment stage, to satisfy Indiana’s safer, feasible alternative design requirement in cases in which the claimant pursues a design defect claim. Indeed, the court’s analysis demonstrates the various facts that Indiana courts should balance when considering whether a suggested alternative design is really safer and feasible than the one the plaintiff is assailing.

Another federal decision during the 2006 survey period that addressed a design defect claim is *Westchester Fire Ins. Co. v. American Wood Fibers, Inc.*¹²⁷ In that case, the plaintiff, Westchester Fire Insurance Company (“Westchester”) filed suit as the subrogee of a company that operated what is referred to in the

124. IND. CODE § 34-20-6-3 (2004).

125. *Id.* at 637.

126. *Id.*

127. No. 2:03-CV-178-TS, 2006 WL 3147710 (N.D. Ind. Oct. 31, 2006).

opinion as the Hammond Expanders plant, a facility damaged by a fire that allegedly was caused when a wood flour product spontaneously combusted.¹²⁸ Defendant American Wood Fibers, Inc. (“AWF”) manufactured the wood flour product.¹²⁹

The jury returned a defense verdict for AWF.¹³⁰ Westchester filed a motion for a new trial pursuant to Federal Rule of Civil Procedure 59(a).¹³¹ The court denied the motion, and in doing so reiterated the reasons why its rulings were correct and why no new trial was warranted. One of the arguments plaintiff offered in support of its attempt to justify a new trial charged that the court erred by dismissing its manufacturing defect claim and its design defect claim.¹³² Specifically, the plaintiff argued that the defendant’s wood flour was defective because it contained “extractives” that were naturally present in the wood more likely for it to spontaneously combust.¹³³ The defendant’s manufacturing process ground wood into wood flour and did not reduce or remove the naturally occurring level of extractives.¹³⁴

The court dismissed the manufacturing claim because Westchester submitted no evidence suggesting that the wood flour deviated in any way from the intended design or differed in any way from the wood flour AWF normally manufactured.¹³⁵ The court also dismissed the design defect claim because Westchester presented no evidence showing there as a safer, reasonably feasible alternative.¹³⁶ Indeed, according to the court, Westchester offered no evidence “as to whether it is possible to remove or reduce the extractives from wood flour or as to the cost of doing so.”¹³⁷

2. *Warning Defect Theory.*—The IPLA contains a specific statutory provision covering the warning defect theory, which reads as follows:

A product is defective . . . if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.¹³⁸

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the

128. *Id.* at *1.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at *5.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. IND. CODE § 34-20-4-2 (2004).

same as the requirement that the defect be latent or hidden.¹³⁹

Indiana courts have been active in recent years in resolving cases espousing warning defect theories, including *Conley v. Lift-All Co.*,¹⁴⁰ *First National Bank & Trust Corp. v. American Eurocopter Corp.* (“*Inlow II*”)¹⁴¹ and *Birch v. Midwest Garage Door Systems*.¹⁴² The 2006 survey year brought continued activity, and three cases deserve discussion.

In *Tober v. Graco Children’s Products, Inc.*,¹⁴³ the Seventh Circuit addressed the viability of a post-sale duty to warn claim under Indiana law.¹⁴⁴ In that case, the Tobers sued Graco after their eight-month old son, Trevor, was asphyxiated when he became entangled in the harness straps of a Lil’ Napper swing on the

139. *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.5 (7th Cir. 2004). For a more detailed analysis of *Inlow II*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1221-27 (2005).

140. No. 1:03-CV-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005).

141. *Inlow II*, 378 F.3d 682, No. IP 99-0830-C H/K, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002), *aff’g In re Inlow Accident Litig. (Inlow I)*. In the *Inlow* cases, a helicopter rotor blade struck and killed the Consec general counsel, Lawrence Inlow, as he passed in front of the helicopter after disembarking. *Id.* at 685. Because of the helicopter’s high-set rotor blades, the court determined as a matter of law that the deceleration-enhanced blade flap was a hidden danger of the helicopter and that the manufacturer had a duty to warn its customers of that danger. *Id.* at 688. The court ultimately held, however, that the manufacturer satisfied its duty to warn Consec and Inlow as a matter of law in light of the sophisticated intermediary doctrine. *Id.* at 692-93.

142. 790 N.E.2d 504 (Ind. Ct. App. 2003). In *Birch*, a young girl sustained serious injuries when the door of the garage closed on her. *Id.* at 508. The court concluded that the garage door system at issue was not defective and that a change in an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 518. The court concluded that there was no duty to warn plaintiffs about changes in federal safety regulations because the system manual the plaintiffs received included numerous warnings regarding the type of system installed and that no additional information about garage door openers would have added to the plaintiffs’ understanding of the characteristics of the product. *Id.* at 518-19. For a more detailed analysis of *Birch*, see Alberts & Bria, *supra* note 26, at 1262-65; *see also* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002) (rejecting plaintiff’s argument that a saw should have had warning labels making it more difficult for the saw guard to be left in a position where it appeared installed when in fact it was not; the scope of the duty to warn is determined by the foreseeable users of the product and there was no evidence that the circumstances of plaintiff’s injuries were foreseeable such that defendants had a duty to warn against those circumstances); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096 (Ind. Ct. App. 2001) (holding that the trial court should have addressed whether the risks associated with use of a product were unknown or unforeseeable and whether the defendants had a duty to warn of the dangers inherent in the use of the product, because designated evidence showed that both defendants knew that the product at issue was to be used in conjunction with high temperatures that occurred as a result of the hot welding process). For a more detailed analysis of *Burt* and *McClain*, see Alberts & Boyers, *supra* note 35, at 1182-85.

143. 431 F.3d 572 (7th Cir. 2005).

144. *Id.* at 579.

morning of April 2, 2002.¹⁴⁵ Trevor was placed in the Lil' Napper swing by his daycare provider and left unattended.¹⁴⁶ The Lil' Napper swing had the following warning label:

NEVER LEAVE CHILD UNATTENDED
ALWAYS KEEP CHILD IN VIEW EVEN WHILE SLEEPING
STAY WITHIN REACH OF YOUR CHILD.¹⁴⁷

In addition, the swing's instruction manual stated that "failure to use the harness restraint system properly could result in the baby falling from the swing."¹⁴⁸ There was no warning in the manual regarding the risk of strangulation.¹⁴⁹ By 1997, Graco had received several reports of children sustaining injuries or death after becoming entangled in the Lil' Napper harness.¹⁵⁰ Graco recalled the Lil' Napper swings in 1997 to retrofit them with new seat pads and new harnesses to prevent the risk of strangulation.¹⁵¹

The Tobers alleged that Graco: (1) failed to correct the defect in the Lil' Napper swings; (2) failed to warn of the swing's risks; and (3) failed to adequately recall the swings.¹⁵² The district court granted Graco's summary judgment motion with respect to the recall issue, determining that Indiana courts do not recognize a claim for negligent recall.¹⁵³ The district court also granted Graco's summary judgment motion with respect to the Tobers' warning claim, concluding that it was merely a re-packaged negligent recall claim.¹⁵⁴

The Tobers appealed the district court's ruling with regard to the warning claim and contended that Graco was "unreasonably dilatory in discharging its post-sale duty to warn¹⁵⁵ of the strangulation hazard posed by the Lil' Napper."¹⁵⁶ The Tobers also contended that Graco finally did issue a post-sale warning, via a recall, the warning was flawed."¹⁵⁷ The Tobers contended that two cases established a post-sale duty to warn under Indiana law:¹⁵⁸ *Dague v. Piper*

145. *Id.* at 575.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 577.

153. *Id.*

154. *Id.* at 577-78.

155. A "post-sale" duty to warn refers to hazards that the manufacturer discovers after the product is sold. Warnings that relate to hazards that the manufacturer knows or has reason to know of at the time of sale are called "point of sale" warnings. *Id.* at 578 n.6.

156. *Id.* at 578.

157. *Id.*

158. *Id.*

*Aircraft Corp.*¹⁵⁹ and *Reed v. Ford Motor Company Co.*¹⁶⁰ The Seventh Circuit decided that the Tobers overstated the holdings of *Dague* and *Reed* and that the district court correctly granted summary judgment on this claim:

In our review of the IPLA as well as state and federal case law, we too find that, although the Indiana legislature did not expressly exclude a manufacturer's post-sale duty to warn from the IPLA, the statute does not expressly prescribe or define any cause of action arising from a post-sale duty to warn. Therefore, the Tobers' claim that Graco breached its post-sale duty to warn fails . . .¹⁶¹

Tober is, therefore, significant for Indiana product liability practitioners because it recognizes that the IPLA does not authorize a cause of action for breaching a "post-sale duty to warn."¹⁶²

Another important case addressing failure to warn claims under the IPLA is *Ford Motor Co. v. Rushford*.¹⁶³ *Rushford* discusses the extent to which a seller and manufacturer have a duty to provide additional warnings after learning of the unique characteristics of a particular consumer.¹⁶⁴ In that case, the plaintiff, Marilyn Rushford ("Rushford"), was injured when the front-passenger airbag of her Ford Focus deployed during a front-end collision.¹⁶⁵ Rushford's husband, Charles, was driving at the time of the accident, and Rushford was riding in the front passenger seat.¹⁶⁶ The Rushfords purchased the car from Eby Ford Lincoln Mercury.¹⁶⁷ When they purchased the car, Rushford told the Eby salesman that she did not drive and that Charles would be the primary driver.¹⁶⁸

The front passenger visor of the car contained the following warning:

! WARNING

DEATH or SERIOUS INJURY can occur

Children 12 and under can be killed by the air bag

The BACK SEAT is the SAFEST place for children

NEVER put a rear-facing child seat in the front

Sit as far back as possible from the air bag

ALWAYS use SEATBELTS and CHILD RESTRAINTS¹⁶⁹

Rushford did not read the warning on the sun visor, although she admitted

159. 418 N.E.2d 207 (Ind. 1981).

160. 679 F. Supp. 873 (S.D. Ind. 1988).

161. *Tober*, 431 F.3d at 579.

162. *Id.*

163. 845 N.E.2d 197 (Ind. Ct. App. 2006), *trans. granted* (Ind. Oct. 3, 2006).

164. *Id.* at 201-02.

165. *Id.* at 199.

166. *Id.*

167. *Id.* at 198.

168. *Id.* at 198-99.

169. *Id.* at 198.

seeing it.¹⁷⁰ In addition, the owner's manual contained the following warning:

Seating and Safety Restraints

While the system is designed to help reduce serious injuries, it may also cause abrasions, swelling or temporary hearing loss.

Because air bags must inflate rapidly and with considerable force, there is the risk of death or serious injuries such as fractures, facial and eye injuries or internal injuries, particularly to occupants who are not properly restrained or are otherwise out of position at the time of air bag deployment. Thus, it is extremely important that occupants be properly restrained as far away from the air bag module as possible while maintaining vehicle control.¹⁷¹

Rushford did not read the owner's manual, and she contended that no one told her that the owner's manual contained a warning regarding the airbags.¹⁷² Rushford sued Eby and Ford, alleging that they failed to warn of the risks airbags pose to short people.¹⁷³ Ford and Eby filed motions for summary judgment, which the trial court denied.¹⁷⁴

On appeal, Rushford conceded that the airbag warning contained in the owner's manual was adequate, although she never read it.¹⁷⁵ Rather, she argued that Ford and Eby had a duty to orally warn her that owner's manual contained the airbag warning.¹⁷⁶ In light of the fact that she told the salesman at the Eby dealership that she did not drive, it was unlikely that she would ever read the manual.¹⁷⁷

With regard to Ford's motion for summary judgment, the court pointed out that there was no evidence showing Ford knew Rushford did not drive.¹⁷⁸ Furthermore, there was no evidence that Eby was acting as Ford's agent such that Eby's knowledge should be imputed to Ford.¹⁷⁹ Thus, the appellate court reversed the trial court's denial of Ford's motion for summary judgment.¹⁸⁰

The appellate court, however, reached a different conclusion with regard to Eby's motion for summary judgment. The appellate court held that there was a question of fact regarding whether it was reasonable for Eby, based on its knowledge that Rushford did not drive, to fail to direct her to read the owner's

170. *Id.*

171. *Id.*

172. *Id.* at 198-99.

173. *Id.* at 199-200.

174. *Id.* at 200.

175. *Id.* at 201.

176. *Id.*

177. *Id.*

178. *Id.* at 202.

179. *Id.*

180. *Id.* at 203.

manual.¹⁸¹ Accordingly, the trial court's denial of Eby's summary judgment motion was affirmed.¹⁸²

The court of appeals' decision in *Rushford* is significant because it suggests that a seller may not be able to rely solely upon the manufacturer's warning if the seller has some specific knowledge that the buyer may not read the warning. *Rushford*'s long-term significance may be in doubt because the Indiana Supreme Court granted transfer on October 3, 2006.¹⁸³

Another warning case decided during the survey period is *Williams v. Genie Industries, Inc.*¹⁸⁴ In that case, the plaintiff, Williams, was working at an elevated height in a lift manufactured by defendant Genie Industries, Inc. installing gypsum board on a decorative bulkhead.¹⁸⁵ While Williams was in the basket, the lift was moved to a sloped surface, activating the lift's pothole protection system.¹⁸⁶ As a result, part of the lift extended, and Williams used his hand to dislodge the lift.¹⁸⁷ When the lift dislodged, the basket lowered and Williams's hand was injured when it became caught.¹⁸⁸ Next to Williams's hand on the lift was a warning label that read: "WARNING Crushing Hazard. Contact with moving parts may cause serious death or injury. Keep away from moving parts."¹⁸⁹ Williams did not read the warning.¹⁹⁰ Williams alleged, among other things, that Genie failed to warn of the lift's dangerous propensities.¹⁹¹ Genie moved for partial summary judgment with respect to the failure to warn claim.¹⁹²

The court noted that an adequate warning should cause a reasonable person to exercise safety and caution commensurate with the potential danger, and the court found that the adequacy of warnings is classically a question of fact reserved to the trier of fact.¹⁹³ In addition, the plaintiff must prove proximate cause in a warnings case, which may require the plaintiff to show that an adequate warning would have caused the plaintiff to alter his conduct which led to the injury.¹⁹⁴ Finally, the court stated that the law should provide "a presumption that an adequate warning would have been read and heeded, thereby minimizing the obvious problems of proof of causation."¹⁹⁵

181. *Id.*

182. *Id.*

183. *Id.* at 197.

184. No. 3:04-CV-217 CAN, 2006 WL 1408412 (N.D. Ind. May 19, 2006).

185. *Id.* at *1.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at *3.

191. *Id.* at *1.

192. *Id.*

193. *Id.* at *2.

194. *Id.*

195. *Id.* (citing *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 826

Genie argued (1) that there was “no dispute that warnings were on the lift,” (2) that Williams failed to establish proximate cause, and (3) that because Williams “did not read the warnings affixed to the lift or the operator’s manual,” he could not “assert a failure to warn claim.”¹⁹⁶ The court concluded that although the lift contained warnings, the warnings may not have adequately warned against the particular risk encountered by Williams: at the time of the incident, the lift was not moving; rather, it was stationary.¹⁹⁷ Thus, the adequacy of the warnings was a question of fact for the jury.¹⁹⁸ The court also found that there was a question of fact regarding proximate cause because Williams’ expert suggested that an alternate warning regarding the risk encountered by Williams could have been drafted.¹⁹⁹ Finally, the court rejected Genie’s argument that Williams could not assert a failure to warn claim because he did not read the warning on the lift:

[I]f the warnings are inadequate and the labels fail to capture the user’s attention, failure to read them does not bar the claim as a matter of law. Because there is a question of fact regarding the adequacy of the warnings, this Court cannot find that Williams’ failure to read them bars his claim as a matter of law.²⁰⁰

E. Regardless of the Substantive Legal Theory

Indiana Code section 34-20-1-1 provides that the IPLA “governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought.*”²⁰¹ At the same time, however, Indiana Code section 34-20-1-2 provides that the “[IPLA] shall not be construed to limit any other action from being brought against a seller of a product.”²⁰² In cases where a person who is user or consumer under the IPLA sues an entity that is a manufacturer or seller under the IPLA for what is indisputably a physical harm caused by a product, there is little doubt that the IPLA merges and subsumes all other tort-based theories of recovery, such as common law negligence claims, tort-based breach of warranty claims, and non-IPLA-based statutory claims.²⁰³

(Ind. App. 1975)).

196. *Id.* at *3.

197. *Id.*

198. *Id.*

199. *Id.* at *3-*4.

200. *Id.* at *4.

201. IND. CODE § 34-20-1-1 (2004) (emphasis added).

202. *Id.* § 34-20-1-2.

203. The statutory theory applies because in Indiana the causes of action that typically seek redress for physical harm spring from tort-based theories of recovery. *See* N.H. Ins. Co. v. Farmer Boy AG, Inc., No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at *10-*11 (S.D. Ind. Dec.

Indeed, three cases decided during the survey period reinforce the IPLA merger premise under such circumstances. In the first case, *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,²⁰⁴ a fire that allegedly started in a toaster manufactured by the defendant, Hamilton Beach/Proctor Silex (“Hamilton Beach”), destroyed a couple’s home and personal property.²⁰⁵ Cincinnati Insurance insured the couple’s home and brought a subrogation action against Hamilton Beach,²⁰⁶ asserting claims for negligence, breach of warranty, strict liability, violation of the Magnuson-Moss Warranty Act, and negligent failure to recall.²⁰⁷ Hamilton Beach moved to dismiss the negligence, warranty, Magnuson-Moss, and negligent failure to recall claims.²⁰⁸

Hamilton Beach argued that the IPLA subsumes all negligence and warranty claims, that the Magnuson-Moss claim could not survive without an underlying state-based warranty claim, and that Indiana law does not recognize in any event a negligent failure to recall claim.²⁰⁹ The court agreed that the IPLA subsumes and incorporates all negligence and tort-based warranty claims,²¹⁰ reasoning as follows:

Though the [IPLA] describes separate proof schemes derived from strict liability and negligence standards, the [IPLA] itself provides for a single cause of action when a consumer seeks to recover from a manufacturer or seller for physical harm. . . . In pleading the negligence and [IPLA-based] counts, [plaintiffs] allege the same basic facts regarding the design and manufacture of the toaster and describe the same resulting physical harm from its alleged malfunction. Each count aligns with the requirements of I.C. § 34-20-2-1 with an identical set of facts. Each claim is asserted by the same consumer against the same manufacturer for the same physical harm caused by the same product. Though the [plaintiffs] have alleged underlying theories that include design defects, manufacturing defects, and negligence, the [IPLA] explicitly states that it governs “regardless of the substantive legal theory upon which the action is brought.”²¹¹

The second of the three survey period cases reinforcing the IPLA merger

19, 2000) (holding that a claim alleging breach of implied warranty in tort has been superceded by IPLA-based liability and, thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

204. No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006).

205. *Id.* at *1.

206. Cincinnati Insurance also brought a subrogation action against Kellogg Company, the entity that sold the Pop Tart that allegedly was in the toaster when the fire started. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at *2.

211. *Id.* (citations omitted).

premise is *Ryan v. Philip Morris USA, Inc.*²¹² In *Ryan*, the widow of a man who allegedly died as a result of smoking asserted causes of action against several cigarette manufacturers for product liability, negligence, and fraud.²¹³ The defendants argued that the IPLA provides the sole and exclusive remedy for personal injuries allegedly caused by a product.²¹⁴ The court agreed, holding that the IPLA unequivocally precludes plaintiff's common law negligence and fraud claims.²¹⁵

The third case merging a non-IPLA-based tort theory into the IPLA is *Fellner v. Philadelphia Toboggan Coasters, Inc.*,²¹⁶ first discussed above in the section involving what entities qualify as "manufacturers" and "sellers." The case involved a person who was killed when she was ejected from a wooden roller coaster at Holiday World amusement park.²¹⁷ One of the defendants that the personal representative of Fellner's estate sued was Koch Development Corp. ("Koch"), the entity that owned and operated both Holiday World and the roller coaster involved.²¹⁸ Plaintiff sought to hold Koch liable for negligence, strict liability, and breach of implied warranties.²¹⁹

Like the decisions in *Cincinnati Insurance* and *Ryan*, the *Fellner* decision held that the tort-based implied warranty claim merged into plaintiff's IPLA-based product liability claims, resulting in dismissal of the breach of implied warranty claim because it was not a stand-alone theory of recovery.²²⁰ As noted

212. No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006).

213. *Id.* at *1. The plaintiff also asserted a claim for punitive damages. *Id.*

214. *Id.* at *2.

215. *Id.* "Because the court agrees that all of [plaintiff's] claims are preempted, or supplanted, by the [IPLA], the motion to dismiss will be granted with respect to Plaintiff's common law claims for negligence and fraud." *Id.* Defendants also argued that the plaintiff's fraud claims were not pleaded with the requisite particularity that Federal Rule of Civil Procedure 9(b) requires. *Id.* Because the court agreed that the IPLA precludes the fraud claim, it did not need to reach the issue about whether the fraud claim was pleaded with sufficient particularity. *Id.* at *3. The court's decision to dismiss the negligence and fraud claims did not, however, equate to a dismissal of plaintiffs' entire case because the court correctly recognized that her complaint pleaded factual allegations sufficient to support (at least at the motion to dismiss stage) an IPLA-based product liability claim. *Id.*

216. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006).

217. *Id.* at *1.

218. *Id.*

219. *Id.* The negligence claim against Koch asserts that Koch: (1) "failed to ensure that Fellner was safely and properly secured by the restraints"; (2) "failed to properly hire, train and supervise ride attendants"; and (3) "failed to properly test, inspect, and maintain the restraints." *Id.* The so-called "strict liability" claim appears to assert that Koch failed to "provide proper and adequate warnings" about the roller coaster. *Id.* There is also an allegation that Koch "failed to comply with local, state, and federal regulations, ordinances, rules, and statutes applicable to amusement park rides." *Id.* It is difficult to determine whether such an allegation is intended to support an IPLA-based theory of recovery or a common law negligence theory of recovery.

220. *Id.* at *4.

above, however, it is important to point out that the *Fellner* decision employs the term “strict liability” as if it is synonymous with all IPLA-based product liability claims.²²¹ It is not. The IPLA imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the exercise of “all reasonable care”) only for those claims relying upon a manufacturing defect theory.²²² Thus, when interpreting the *Fellner* decision, practitioners should recognize that the court merged the tort-based breach of implied warranty claim into the IPLA claim even though only plaintiff’s manufacturing defect theory involves “strict liability.”

The foregoing merger premise applies only to tort-based theories of recovery when a product causes physical harm. Contract-based warranty theories of recovery are independent from tort-based warranty theories, and the former undoubtedly fall into the category of “any other action” that Indiana Code section 34-20-1-2 does not limit.²²³

A potential conflict between Indiana Code sections 34-20-1-1 and 34-20-1-2 might exist, however, in cases in which the factual circumstances disqualify a claim from being brought under the IPLA yet a product nevertheless causes the physical harm for which the plaintiff seeks redress. In recent years, courts have

221. *Id.*

222. IND. CODE § 34-20-2-2 (2004); *see also* Mesman v. Crane Pro Servs., 409 F.3d 846, 849 (7th Cir. 2005) (“Under Indiana’s products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design”); First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 690 n.4 (7th Cir. 2004) (“Both Indiana’s 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles.”); Conley v. Lift-All Co., No. 1:03-CV-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *12-*13 (S.D. Ind. July 25, 2005) (“The IPLA effectively supplants [the plaintiff’s] common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff’s common law claims will therefore be treated as merged into the IPLA claims.”); Bourne v. Marty Gilman, Inc., No. 1:03-CV-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 (S.D. Ind. July 20, 2005) (“[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence.”), *aff’d* 452 F.3d 632 (7th Cir. 2006); Birch v. Midwest Garage Door Systems, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003); Miller v. Honeywell Int’l Inc., No. IP98-1742C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002); Burt v. Makita USA, Inc., 212 F. Supp. 2d 892, 899-900 (N.D. Ind. 2002); Kennedy v. Guess, Inc., 765 N.E.2d 213, 220 (Ind. Ct. App. 2002), *vacated*, 806 N.E.2d 776 (Ind. 2004).

223. *Fellner*, 2006 WL 2224068; *see also* N.H. Ins. Co. v. Farmer Boy AG, Inc., No. IP98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at *10-*11 (S.D. Ind. Dec. 19, 2000) (holding that a claim alleging breach of implied warranty in tort has been superceded by IPLA-based liability and, thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

made no mention of the possibility of a conflict between the two provisions and have had little trouble allowing claims involving plaintiffs and defendants that are otherwise outside the IPLA's scope to exist when a product has caused physical harm.²²⁴ In those instances, practitioners are left to ponder to what degree section 34-20-1-2's admonition against limiting "any other action" conflicts with section 34-20-1-1's apparent requirement that *all* claims for physical harm caused by a product "regardless of the substantive legal theory or theories upon which the action is brought" be merged into the IPLA. Legislative action may be the only way to definitively resolve the issue.

In this context, recall the *Vaughn v. Daniels Co. (West Virginia), Inc.* case,²²⁵ which we first addressed above in the "user" or "consumer" section. There, the plaintiff, Stephen Vaughn, worked for a construction company that Daniels hired to install a coal sump in a coal plant.²²⁶ Vaughn was injured during the installation process when he climbed onto the top of the sump to help connect a pipe and the chain others were using to secure the pipe gave way.²²⁷ Daniels's responsibility was to design and build a coal preparation plant on premises owned by Solar Sources, Inc. in Cannelburg, Indiana.²²⁸ As part of its contract to build the plant, Daniels was responsible for designing and installing a heavy media coal sump.²²⁹ Daniels's plans called for the sump to be delivered to the site in an unassembled state and then assembled and installed on-site by the subcontractor, Trimble Engineers and Constructors, Inc. ("Trimble").²³⁰ Vaughn was a Trimble employee.²³¹

After first concluding that Vaughn did not have an IPLA-based product liability claim based upon a design defect theory because he was not a "user" or "consumer,"²³² the court nevertheless allowed a similarly-styled common law

224. *E.g.*, *Ritchie v. Glidden Corp.*, 242 F.3d 713 (7th Cir. 2000); *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002) (applying Indiana law); *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004). In a case decided during the 2006 survey period, *Dutchmen Mfg., Inc. v. Reynolds*, 849 N.E.2d 516 (Ind. 2006), the Indiana Supreme Court allowed a negligence claim based upon § 388 of the Restatement (Second) of Torts to proceed against a tenant's predecessor and a landlord in a case involving personal injuries sustained as a result of an alleged failure to warn the successor tenant about a known defect in the scaffolding. *Id.* at 518-21. However, the scaffolding was assembled and installed by the predecessor tenant in a manner that affixed it to the ceiling beams of the leased building. *Id.* at 520-22. Therefore, the case does not appear to involve any "product liability" claims because the injury does not appear to have occurred as the result of any "product" placed in the stream of commerce. *Id.* at 522-23.

225. 841 N.E.2d 1133 (Ind. 2006).

226. *Id.* at 1136.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *See supra* notes 18-32 and accompanying text.

“negligent design” claim against Daniels to survive summary judgment.²³³ In doing so, the court reasoned that imposing a common law negligence duty upon Daniels was appropriate because “[t]he relationship between Daniels and Vaughn was that of designer-seller of the product and an employee of the designer-seller’s subcontractor who assembled and installed the product before delivery to the final purchaser.”²³⁴ The court further reasoned that “[i]t was reasonably foreseeable that if Daniels did not use reasonable care to design a safe unassembled and uninstalled facility, those who handled [the product] in the process of assembly and installation, including Vaughn, might be at risk of injury.”²³⁵

The *Vaughn* court appears to accept the basic premise that extra-IPLA tort liability can be imposed in cases in which a product causes physical harm despite the fact that the plaintiff is precluded from bringing an IPLA action because he is not the product’s “user.”²³⁶ The court’s subsequent analysis of the extra-IPLA negligence claim, however, requires some close scrutiny with regard to exactly what kind of claim the court allowed Vaughn to pursue.

Because Vaughn’s surviving “common law” negligence claim alleged “negligent design” against Daniels, it might create some confusion given the court’s clear holding that there is no IPLA-based product liability against Daniels for defective “design” of the particular product itself (the coal sump).²³⁷ So what does one make of the surviving negligence claim asserting improper design? Is it really a design defect product liability claim masquerading for its very survival as a common law claim? Probably not, but the answer to that question is not completely clear. According to the court, Daniels’s potential common law negligence liability appears to spring from its role as the designer of the working conditions and circumstances under which the coal sump was installed and not from the design of the coal sump itself. It seems fair to say that the court characterizes Daniels’s common law negligence liability, if any, as deriving from Daniels’s common law requirement to design and implement sufficient safety devices to protect workers such as Vaughn during assembly and installation of the product at issue (the coal sump).

Viewed in that way, there is a discernable difference between the nature of the common law “negligent design” claims and the IPLA-based product liability claims that are based upon an alleged design defect in the coal sump itself. As such, the court’s holding allowing a common law “design” claim to exist outside

233. *Vaughn*, 841 N.E.2d at 1145-46. In dealing with Vaughn’s negligence claims, the court first determined that defendant Solar Sources, Inc., as Daniels’s principal, was not liable as Daniels’s alleged independent contractor. *Id.* at 1143-44. The court also initially determined that Daniels was not liable by virtue of having assumed via a written safety policy a duty for the design safety of the construction site, nor was Daniels liable by virtue of owing a contractual duty to Vaughn. *Id.* at 1144-45.

234. *Id.* at 1145.

235. *Id.*

236. *Id.* at 1144.

237. *Id.*

the IPLA may not be inconsistent with the IPLA's requirement that all physical harm claims that a product causes (Vaughn's only allegations) be brought under the IPLA "regardless of the substantive legal theory or theories upon which the action is brought."²³⁸

II. STATUTES OF REPOSE AND LIMITATION

The IPLA contains a statute of limitation and a statute of repose for product liability claims. Indiana Code section 34-20-30-1 provides,

(a) This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-11-6-1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

- (1) within two (2) years after the cause of action accrues; or
- (2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.²³⁹

Product liability cases involving asbestos products, however, have a unique statute of limitation. Indiana Code section 34-20-3-2(a) provides that a product liability action based upon either "property damage resulting from asbestos" or "personal injury, disability, disease, or death resulting from exposure to asbestos . . . must be commenced within two (2) years after the cause of action accrues."²⁴⁰ That rule applies, however, "only to product liability actions against . . . persons who mined and sold commercial asbestos," and to "funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims."²⁴¹

During the survey period, three interesting cases involving the statutes of limitation and repose were decided. Two of the cases, *Morgan v. Columbus*

238. IND. CODE § 34-20-1-1 (2004) (emphasis added).

239. *Id.* § 34-20-3-1.

240. *Id.* § 34-20-3-2(a).

241. *Id.* § 34-20-3-2(d). For a discussion of the asbestos-related statute of repose, see *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005) and Alberts et al., *supra* note 90, at 1181.

*McKinnon Corp.*²⁴² and *Bumpus v. Frey*,²⁴³ involve the application of the discovery rule to the statute of limitation. The cases reach conflicting conclusions, despite the similarity of their facts. The third case, *Briggs v. Griffin Wheel Corp.*,²⁴⁴ addresses whether a principal distributor or seller of asbestos-containing products can be considered a “miner and seller” for the purposes of the asbestos-related statute of limitation.

In *Morgan v. Columbus McKinnon Corp.*,²⁴⁵ the plaintiff (“Morgan”) sustained an electrical shock while using a chain hoist at his place of employment.²⁴⁶ The chain hoist was manufactured by Columbus McKinnon Corporation and sold to Horner Electric, Inc. (“Horner”).²⁴⁷ Horner modified the hoist and sold it to Ferguson Enterprises, Inc.²⁴⁸ The hoist was later delivered to Morgan’s employer.²⁴⁹ Morgan sustained the electric shock on May 24, 2001.²⁵⁰ The next day, Morgan went to the plant physician complaining of an ache in his left arm and neck and a feeling of nervousness.²⁵¹ He was evaluated by a neurologist on November 1, 2001, who diagnosed Morgan with “[s]pells following an electrocution.”²⁵² He was also evaluated by a neuropsychologist on August 27, 2003, who diagnosed Morgan with mild cognitive impairment.²⁵³

Morgan sued Columbus, Ferguson, and an “unknown party” on May 13, 2003.²⁵⁴ On March 19, 2004, Morgan filed an amended complaint naming Horner as a defendant.²⁵⁵ Horner filed a motion for summary judgment, arguing that Morgan’s claims were barred by the statute of limitations.²⁵⁶ The trial court granted the motion for summary judgment, and Morgan appealed.²⁵⁷

The court of appeals affirmed the trial court’s decision.²⁵⁸ Indiana Code section 34-20-3-1 provides that any product liability action based upon negligence or strict liability must be commenced within two years after the cause of action accrues.²⁵⁹ The court noted that under the “discovery rule,” the statute of limitations runs from “the date the plaintiff knew or should have discovered

242. 837 N.E.2d 546 (Ind. Ct. App.), *trans. denied* 841 N.E.2d 187 (Ind. 2005).

243. No. 3:05-cv-0056-RLY-WGH, 2006 WL 2640000 (S.D. Ind. Sept. 13, 2006).

244. 851 N.E.2d 1261 (Ind. Ct. App. 2006).

245. 837 N.E.2d 546 (Ind. Ct. App. 2006).

246. *Id.* at 547-48.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 548.

252. *Id.* (quoting the neurologist).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 551.

259. IND. CODE § 34-20-3-1 (2004).

that she suffered an injury or impingement, and that it was caused by the product or act of another.”²⁶⁰ Morgan argued that he did not receive a diagnosis of cognitive and psychological disorders until October 30, 2001, several months after the electric shock.²⁶¹ The court rejected that argument and held that Morgan experienced symptoms that would cause a reasonable person to take action that would lead to discovery of his cause of action:

Events short of diagnosis can provide a plaintiff with enough evidence to take action; once a plaintiff’s doctor expressly informs the plaintiff that there is a reasonable possibility, if not a probability, that an injury was caused by an act or product, then the statute of limitations begins to run.²⁶²

Morgan was treated for complaints related to the shock as early as the day after the shock occurred.²⁶³ The court concluded that his symptoms were such that a person of reasonable diligence would take action that would lead to the discovery of his cause of action.²⁶⁴ Thus, the court affirmed the trial court’s decision that the statute of limitation began to run no later than May 25, 2001, the date of his first treatment after the shock.²⁶⁵

In *Bumpus v. Frey*,²⁶⁶ Judge Richard L. Young reached a different conclusion in a case with similar facts. In that case, the plaintiff (“Bumpus”) worked on a melon farm. He was exposed to a crop fumigant on or before April 17, 2003, and claimed that he suffered serious and permanent injury.²⁶⁷ On April 28, 2005, Bumpus sued Hendrix and Dail, Inc. (“H&D”), the company that supplied the chemical.²⁶⁸ During discovery, Bumpus admitted that he experienced symptoms immediately after his exposure to the chemical.²⁶⁹ On that basis, H&D moved for summary judgment, claiming that the two-year statute of limitations barred Bumpus’s claims.²⁷⁰ Bumpus argued that his action against H&D was timely because he did not notice significant respiratory problems and was not diagnosed with a medical problem related to the exposure until June 2003.²⁷¹

Judge Young held that under the discovery rule it was not reasonable to expect that Bumpus would be immediately aware of the medical problems associated with the exposure, especially in light of the fact that he did not receive

260. *Morgan*, 837 N.E.2d at 549 (quoting *Degussa Corp. v. Mullens*, 744 N.E.2d 407, 410 (Ind. 2001)).

261. *Id.* at 549.

262. *Id.* at 549-50.

263. *Id.* at 550.

264. *Id.*

265. *Id.*

266. No. 3:05-cv-0056-RLY-WGH, 2006 WL 2640000 (S.D. Ind. Sept. 13, 2006).

267. *Id.* at *1.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at *2.

medical confirmation until June 2003, several months after the exposure.²⁷² Accordingly, Judge Young found that the statute of limitation did not begin to run until June 2003, and Bumpus's action against H&D was timely filed.²⁷³

*Briggs v. Griffin Wheel Corp.*²⁷⁴ addresses whether a principal distributor or seller of asbestos-containing products can be considered a "miner and seller" for the purposes of the asbestos-related statute of limitation. In that case, the plaintiff, Briggs, brought a wrongful death and loss of consortium claim against Griffin Wheel Corporation ("Griffin") and Railroad Friction Products ("RFP"), sellers/distributors of asbestos-containing products.²⁷⁵ She alleged that her husband died as a result of asbestos exposure at his place of employment.²⁷⁶ Briggs's husband retired in 1982, but Briggs did not file suit until February 3, 2000.²⁷⁷ Griffin and RFP filed motions for summary judgment alleging that Briggs's claims were barred by the statute of repose contained in Indiana Code section 34-20-3-1.²⁷⁸ Because Briggs's husband retired in 1982, it was apparent that Briggs's claim was filed more than ten years after any possible delivery of an asbestos-containing product.²⁷⁹

Briggs argued that the asbestos-related statute of limitation should apply to her claim rather than the general statute of limitation found in Indiana Code section 34-20-3-1.²⁸⁰ She argued that because the companies that manufactured the asbestos-related products were bankrupt and outside the court's jurisdiction, the distributor/sellers should be considered "manufacturers" under Indiana Code section 34-20-2-4, which provides that a manufacturer's principal seller or distributor can be deemed a "manufacturer" if the court is unable to hold jurisdiction over the manufacturer in-fact.²⁸¹ In making this argument, Briggs attempted to bring the distributor/seller defendants within the "miners and sellers" exception of Indiana Code section 34-20-3-2.²⁸²

The court concluded that even if the defendants could be considered manufacturers under Indiana Code section 34-20-2-4, the statute plainly states that a "principal distributor or seller" may be considered to be a "manufacturer" for purposes of Indiana Code section 34-20-2 only.²⁸³ Accordingly, Indiana Code section 34-20-2-4 does not bear on the statutes of limitation found in Indiana Code section 34-20-3.²⁸⁴ The court also noted that the asbestos exception to the

272. *Id.*

273. *Id.*

274. 851 N.E.2d 1261 (Ind. Ct. App. 2006).

275. *Id.* at 1264.

276. *Id.* at 1262.

277. *Id.*

278. *Id.*

279. *Id.* at 1262-63.

280. *Id.*

281. IND. CODE § 34-20-2-4 (2004).

282. *Briggs*, 851 N.E.2d at 1263.

283. *Id.*

284. *Id.*

statute of repose should be narrowly construed; it is to apply only to those persons who mine and sell asbestos:

[W]e do not believe that construing a principal distributor or seller of asbestos-containing products as a manufacturer would in turn expose it to the miner and seller exception. It would be illogical for us to consider a manufacturer to be a miner and seller of commercial asbestos, especially in light of our Supreme Court's clear interpretation of IC 34-30-3-2.²⁸⁵

Thus, the court held that the claims against the seller and distributor of the asbestos were subject to the ten-year statute of repose.

III. EVIDENTIARY PRESUMPTION FOR COMPLIANCE WITH GOVERNMENT STANDARDS

The IPLA, via Indiana Code section 34-20-5-1, entitles a manufacturer or seller to a rebuttable presumption that the product causing the physical harm is not defective and that the product's manufacturer or seller is not negligent if, before the sale by the manufacturer, the product:

- (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or
- (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.²⁸⁶

In an important and well-reasoned decision, the Indiana Supreme Court interpreted and clarified this presumption, offering guidance to the practitioner on the appropriate role the presumption plays in jury trials. In *Schultz v. Ford Motor Co.*,²⁸⁷ the plaintiff ("Schultz") was injured when he lost control of his Ford Explorer. The vehicle rolled over and the roof collapsed, rendering Schultz a quadriplegic.²⁸⁸ Schultz and his wife sued Ford, alleging negligence and defective roof design.²⁸⁹ During trial, the court gave the jury the following instruction:

Ford Motor Company has alleged that the Plaintiffs' 1995 Ford Explorer complied with the Federal Motor Vehicle Safety Standard 216. Ford Motor Company has the burden of proving this allegation. If you find Ford Motor Company has proved by a preponderance of the evidence that before the 1995 Ford Explorer was sold by Ford Motor Company

285. *Id.* at 1264.

286. IND. CODE § 34-20-5-1 (2004).

287. 857 N.E.2d 977 (Ind. 2006).

288. *Id.* at 979.

289. *Id.*

that it complied with Federal Motor Vehicle Standard 216 then you may presume that Ford Motor Company was not negligent in its design of the 1995 Ford Explorer and that the 1995 Ford Explorer was not defective. However the Plaintiffs may rebut this presumption if they introduced evidence tending to show that the 1995 Ford Explorer was defective.²⁹⁰

At trial, the jury rendered a verdict in favor of Ford.²⁹¹ On appeal, the Schultzes contended that the trial court committed reversible error by giving the jury instruction. The court of appeals agreed and held that the “rebuttable presumption of IC 34-20-5-1 is not evidence; instead it should be used as guidance for the court and not as evidence for the jury.”²⁹²

The supreme court vacated the court of appeals decision and affirmed the trial court’s issuance of the jury instruction.²⁹³ The court held that under Indiana Evidence Rule 301, the trial court may instruct the jury that “when a basic fact is proven, the jury may infer the existence of a presumed fact.”²⁹⁴

The key to the court’s decision was its interpretation of Indiana Evidence Rule 301, which provides:

In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. *A presumption shall have continuing effect even though contrary evidence is received.*²⁹⁵

The *Schultz* court began its analysis by discussing two competing approaches to presumptions.²⁹⁶ The first approach, “referred to as the ‘bursting bubble’ theory,” states that a presumption is not evidence that can be weighed by the jury.²⁹⁷ The presumption disappears from the case when the party against whom the presumption operates introduces evidence that disputes the presumed fact.²⁹⁸ The “bursting bubble theory” does not shift the burden of persuasion—it only

290. *Id.* at 979-80.

291. *Id.* at 979.

292. *Schultz v. Ford Motor Co.*, 822 N.E.2d 654, 655 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 182 (Ind. 2005).

293. *Schultz*, 857 N.E.2d at 989. It is important to note that Judge John D. Tinder in *Flis v. Kia Motors Corp.*, No. 1:03-cv-1567-JDT-TAB, 2005 WL 1528227 (S.D. Ind. June 20, 2005), correctly predicted the result the Indiana Supreme Court ultimately reached in *Schultz*. See also *Alberts et al.*, *supra* note 90, at 1186-87.

294. *Schultz*, 857 N.E.2d at 985.

295. IND. EVID. R. 301 (emphasis added).

296. *Schultz*, 857 N.E.2d at 982-83.

297. *Id.* at 982.

298. *Id.* at 983.

shifts the burden of production.²⁹⁹ The second approach states that “the finder of fact would be required to find the presumed fact once the basic fact is established, unless the opponent of the presumption persuaded the factfinder of the nonexistence of the presumed fact.”³⁰⁰

The *Schultz* court concluded that the last sentence of Indiana Evidence Rule 301, known as the “continuing effect” rule, was a response to the concern that the “‘bursting bubble’ approach too often prevents juries from effectuating the policies that gave rise to the presumption[.]”³⁰¹ Thus, the court held that “a presumption is properly given ‘continuing effect’ under the last sentence of Indiana Evidence Rule 301 by the trial court instructing the jury that when a basic fact is proven, the jury may infer the existence of a presumed fact.”³⁰²

The court next turned its attention to the IPLA’s governmental compliance presumption and noted that it is not a traditional presumption.³⁰³ According to the *Schultz* court, a conventional presumption:

relieves the party with the burden of proof on a presumed fact from having to produce evidence of the presumed fact once that party has proved a basic fact. Unless the opponent of the presumption presents evidence tending to disprove the presumed fact, the party in whose favor the presumption operates is entitled to judgment on that issue.³⁰⁴

The IPLA’s governmental compliance presumption does not follow this typical presumption pattern because the absence of negligence or defect constitutes the “presumed fact” under the IPLA, and the plaintiff—not the defendant—has the burden of proof on the issue of negligence and defect.³⁰⁵ In light of the unconventional nature of the IPLA’s governmental compliance presumption, the *Shultzes* argued that the presumption should only apply at the summary judgment stage where it would require the plaintiff to come forward with evidence it would not otherwise be required to produce.³⁰⁶ The court noted that the *Schultzes*’ interpretation would not support the policy giving rise to the presumption:

The point of giving “continuing effect” to a presumption through a jury instruction is to further the policies that give rise to the presumption in the first place. By authorizing the instruction here, we recognize the policy embodied by the Legislature in [the governmental compliance statute], regardless of whether the provision conforms to the conventional definition of a legal “presumption.”³⁰⁷

299. *Id.* at 982.

300. *Id.*

301. *Id.* at 985.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 986.

Finally, the *Schultz* court addressed the concern that the use of the word “presumption” in an instruction could have a prejudicial effect on juries.³⁰⁸ The court suggested that it would be less prejudicial to use words such as “infer” or “assume”; however, the inclusion of the verb “presume” and the noun “presumption” in the jury instruction at issue did not amount to reversible error:

Viewed as a substantive matter, we find the instruction to have been balanced, i.e., fair to both sides. To be sure, it told the jury that it could find Ford not to have been negligent in its design of the 1995 Ford Explorer and the Ford Explorer was not defective if it found that Ford had proved its compliance with FMVSS 216. This undoubtedly benefited Ford. But the instruction went on to conclude by telling the jury that it could find this proposition to be rebutted so long as the Schultzes’ introduced evidence tending to show that the 1995 Ford Explorer was defective.³⁰⁹

The court, therefore, affirmed the trial court's issuance of the jury instruction.³¹⁰

IV. DEFENSES

A. *Use With Knowledge of Danger (Incurred Risk)*

Indiana Code section 34-20-6-3 provides that “[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured.”³¹¹ Incurred risk is a defense that “involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor’s actual knowledge and voluntary acceptance of the risk.”³¹² It is a “complete” defense in that it precludes a defendant’s IPLA liability (in design and warning defect cases) if it is found to apply to a particular set of factual circumstances.³¹³

308. *Id.* at 986-87.

309. *Id.* at 987.

310. *Id.* at 989.

311. IND. CODE § 34-20-6-3 (2004).

312. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999); *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *11 (S.D. Ind. Mar. 24, 2005).

313. *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1146 (Ind. 2006) (“Incurred risk acts as a complete bar to liability with respect to negligence claims brought under the [I]PLA.”). On that point, the *Vaughn* decision is consistent with several earlier cases, including *Baker v. Heye-America*, 799 N.E.2d 1135 (Ind. Ct. App. 2003), *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999), and *Cole*, 714 N.E.2d at 194, all of which held that incurred risk is a complete defense in Indiana. *Cf.* *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 745 (Ind. 2005); *Mesman v. Crane Pro Servs.*, 409 F.3d 846 (7th Cir. 2005). Although it held that no IPLA-based claims survived summary judgment, the *Vaughn* court did allow a common

Indiana federal and state courts have decided some important incurred risk cases in the last few years, including *Mesman v. Crane Pro Services, a Division of Konecranes, Inc.*,³¹⁴ *Henderson v. Freightliner, LLC*,³¹⁵ *Smock Materials Handling Co. v. Kerr*,³¹⁶ and *Hopper v. Carey*.³¹⁷ The 2006 survey period ushered in only one additional significant case, *Westchester Fire Insurance Co. v. American Wood Fibers, Inc.*³¹⁸ That case, which we originally addressed above in the context of manufacturing defect and design defect allegations, also involved issues concerning the applicability of IPLA-based defenses. Westchester Fire Insurance Company (“Westchester”) sued American Wood Fibers, Inc. (“AWF”) following a fire at a facility operated by Westchester’s insured. Westchester contended that a wood flour product AWF manufactured allegedly caused the fire when it spontaneously combusted.³¹⁹ One of the arguments Westchester made in support of a new trial was that the trial court erred by giving jury instructions regarding, among other things, the IPLA-based incurred risk and modification/alteration defenses.³²⁰

law negligence claim to proceed against Daniels and, accordingly, allowed the issue of Vaughn’s fault to remain in the case for the jury’s consideration solely in connection with the negligence claim. *Id.* For a discussion about the nature of the negligence claim that the court allowed to survive summary judgment, see *supra* notes 224-35 and accompanying text.

314. 409 F.3d 846 (7th Cir. 2005) (holding that incurred risk defense was not available in case in which a worker was injured when steel sheets fell on him as the sheets were unloaded from a railroad boxcar).

315. No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005) (finding record evidence precluded summary judgment in case involving whether a diesel truck mechanic incurred the risk of an injury; fact issues existed with respect to whether the injuries were suffered while in the process of inspecting a truck’s air suspension system or while working on it).

316. 719 N.E.2d 396 (Ind. Ct. App. 1999) (determining that there was no basis for the incurred risk defense under the facts of that case; plaintiff had no knowledge of the fact that the manufacturer had changed the design of the lift so as to eliminate pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform).

317. 716 N.E.2d 566 (Ind. Ct. App. 1999) (determining that because the plaintiffs did not adequately specify the basis of their claim, it was unclear “whether the defect in the fire truck was open and obvious or whether warnings were placed on the truck informing the passengers of the specific risk from which the Hoppers’ injuries resulted” and the court was unable to determine the applicability of the incurred risk defense); *see also Cole*, 714 N.E.2d at 194 (concluding that because plaintiff’s job necessarily entailed moving containers across a gap between aircraft and aircraft loading equipment and he apparently believed that he had to somehow find a way to work around the known danger posed by the gap, whether plaintiff voluntarily incurred the risk of falling through the gap is a question of fact for the jury’s resolution).

318. No. 2:03-CV-178-TS, 2006 WL 3147710 (N.D. Ind. Oct. 31, 2006).

319. *Id.* at *1.

320. *Id.* One of the other defenses offered at trial that apparently was the subject of a jury instruction was the so-called “sophisticated user” defense. The sophisticated user defense operates to eliminate a manufacturer’s duty to warn of its product’s dangers. The court concluded that the evidence justified giving a sophisticated user instruction because the facility operators had some

The court disagreed, concluding that the jury could have found from the evidence presented that personnel at the Hammond Expanders facility were at fault for the manner in which they handled the wood flour.³²¹ First, the court noted that AWF's warning label instructed that wood flour should be stored in a cool, dry place, yet Hammond Expanders chose to store the flour near the hot compressor room.³²² Second, Hammond Expanders received Material Safety Data Sheet for wood flour from another wood flour supplier warning that wood flour could spontaneously combust.³²³ Third, evidence showed that Hammond Expanders "had some knowledge of the properties and characteristics of wood flour as it used several different types of wood flour in manufacturing its own product."³²⁴ Thus, the court held that the evidence justified a jury instructions about the IPLA-based incurred risk defense, as well as "whether [Westchester] altered or modified the product by storing it next to the hot compressor room."³²⁵

B. Misuse

Indiana Code section 34-20-6-4 provides that it "is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party."³²⁶ Knowledge of a product's defect is not an essential element of establishing the misuse defense. The facts necessary to prove the defense of "misuse" many times may be similar to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers under Indiana Code section 34-20-4-1(1) or that the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable under Indiana Code section 34-20-4-3.

Recent decisions in cases such as *Barnard v. Saturn Corp.*³²⁷ and *Burt v.*

knowledge about the properties and characteristics of wood flour and because they received warning labels addressing proper storage, as well as a Material Data Safety Sheet for wood flour from another wood flour supplier warning that wood flour could spontaneously combust. *Id.* at *2.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. IND. CODE § 34-20-6-4 (2004). Stated in a slightly different way, misuse is a "use for a purpose or in a manner not foreseeable by the manufacturer." *Henderson v. Freightliner, LLC*, No. 1:02-CV-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005) (quoting *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003)) (internal quotation marks omitted).

327. 790 N.E.2d 1023 (Ind. Ct. App. 2003). *Barnard* was a wrongful death action against the manufacturers of an automobile and its lift jack. *Id.* at 1026-27. Plaintiff's decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. The jack gave way, trapping the decedent underneath the car. *Id.* at 1027. Both manufacturers provided safety

*Makita USA, Inc.*³²⁸ have resolved the applicability of the misuse defense as a matter of law. *Henderson v. Freightliner, LLC*,³²⁹ on the other hand, is a 2005 case that determined the incurred risk issue should be presented to a jury.³³⁰ Although the *Vaughn* case involved the court's resolution of a "misuse" issue, the court addressed plaintiff's purported "misuse" not as an IPLA-based defense to a product liability claim, but rather as an element of the jury's consideration in connection with Vaughn's common law negligence claim.³³¹

The statutory definition of "misuse" quoted above appears to consider only the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser's conduct. That would seem to confirm that "misuse" should not be considered "fault" and, therefore, misuse should, as is incurred risk, be a complete defense.³³² Recent decisions, however, continue to

warnings regarding proper use of the jack that the decedent did not follow. *Id.* at 1026. For example, the decedent failed to block the tires while he used the jack, he used the jack when the vehicle was not on a flat surface, and he got underneath his vehicle while it was raised on the jack—all of these actions were contrary to the warnings provided by the manufacturers. *Id.* at 1030. The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed. The *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that "no reasonable trier of fact could find that [the Decedent] was less than fifty percent at fault for the injuries that he sustained." *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question. For a more detailed analysis of *Barnard*, see Alberts & Bria, *supra* note 26, at 1286-87.

328. 212 F. Supp. 2d 893 (N.D. Ind. 2002). In *Burt*, the plaintiff was injured by a circular saw's blade guard. *Id.* at 894. The district court held that there was

no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly attached. To the contrary, the evidence suggest[ed] that the accident was unforeseeable, caused by a very unusual set of factual circumstances.

Id. at 898. Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law. *Id.* That being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met, which necessarily also meant that the defense of "misuse" had been established as a matter of law. *Id.*; see also Alberts & Boyers, *supra* note 35, at 1195-96.

329. No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005).

330. In *Henderson*, defendants argued that plaintiff Henderson began working on a diesel truck's air suspension system without first bleeding the air pressure, which was a misuse because the truck's service manual requires that mechanics, among other things, disconnect the leveling valve and to exhaust all air from the springs. 2005 U.S. Dist. LEXIS 5832, at *5, *10. Judge Hamilton decided that the disputed issues of fact noted above precluded him from granting summary judgment that the misuse defense foreclosed recovery as a matter of law. *Id.* at *10-*14.

331. *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1145-46 (Ind. 2006). For a more detailed discussion about the negligence claim that the *Vaughn* court allowed to survive against Daniels, see *supra* notes 224-35 and accompanying text.

332. The district judge in *Chapman v. Maytag Corp.*, 297 F.3d 682 (7th Cir. 2002), recognized

reach inconsistent results when it comes to that issue. Three decisions, *Burt v. Makita USA, Inc.*,³³³ *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*,³³⁴ and *Morgen v. Ford Motor Co.*,³³⁵ have concluded that misuse is a complete defense. On the other hand, decisions in cases such as *Chapman v. Maytag Corp.*³³⁶ and *Barnard v. Saturn Corp.*³³⁷ have determined that the degree of a user's or a consumer's misuse is a factor to be assessed in determining that user's or consumer's "fault," which must then be compared with the "fault" of the alleged tortfeasor(s).³³⁸

C. Modification and Alteration

Indiana Code section 34-20-6-5 provides that:

[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the

as much. He also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement. *Id.* at 689.

333. 212 F. Supp. 2d 893, 897 (N.D. Ind. 2002).

334. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999), *declined to follow* *Barnard v. Saturn Corp.*, 790 N.E.2d 1023 (Ind. Ct. App. 2003).

335. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *aff'd in part, vacated in part*, 797 N.E.2d 1146 (Ind. 2003).

336. 297 F.3d 682 (7th Cir. 2002). In *Henderson*, Judge Hamilton cited *Chapman* for the proposition that "[t]he misuse defense is not necessarily a complete defense but is an element of comparative fault." *Henderson v. Freightliner, LLC*, NO. 1:02-CV-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005). For a more detailed analysis of *Chapman*, see Alberts & Boyers, *supra* note 35, at 1196-97.

337. 790 N.E.2d 1023 (Ind. Ct. App. 2003). According to the *Barnard* court, "the defense of misuse should be compared with all other fault in a case and does not act as a complete bar to recovery in a products liability action." *Id.* at 1029. The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed. *Id.* "By specifically directing that the jury compare all fault in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme." *Id.* at 1030. See also Alberts & Bria, *supra* note 26, at 1286-87.

338. The 1995 amendments to the IPLA changed Indiana law with respect to fault allocation and distribution in product liability cases. Indeed, the Indiana General Assembly provided that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to Indiana Code section 34-20-8, nor can a defendant be held jointly liable for damages attributable to the fault of another defendant. IND. CODE § 34-20-7-1 (2004). In addition, the IPLA now requires the trier of fact to compare the "fault" (as the term is defined by statute) of the person suffering the physical harm, as well as the "fault" of all others whom caused or contributed to cause the harm. *Id.* § 34-20-8-1(a). The IPLA mandates that "in assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm." *Id.* § 34-20-8-1(b).

modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.³³⁹

The alteration defense is incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1. Indeed, the Indiana Code provides that:

a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if . . . the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.³⁴⁰

Accordingly, if a claimant cannot establish or if a defendant conclusively proves that the product underwent some "substantial alteration" between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief as a threshold matter.³⁴¹

Because the alteration or modification defense is incorporated directly into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1, there should be little controversy that it is "complete" in nature.

*Tober v. Graco Children's Products*³⁴² is a 2005 case that addresses the "alteration" defense.³⁴³ In that case, the Tobers sued Graco after their eight-

339. *Id.* § 34-20-6-5. Before the 1995 Amendments to the IPLA, product modification or alteration operated as a complete defense. *See* *Foley v. Case Corp.*, 884 F. Supp. 313, 315 (S.D. Ind. 1994).

340. IND. CODE § 34-20-2-1 (2004).

341. *Id.*

342. 431 F.3d 572 (7th Cir. 2005).

343. *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DHF-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005), is an important "alteration" case that decided during the 2005 survey period. There, a truck mechanic was injured while either working on or preparing to work on a Freightliner truck's air suspension assembly. The truck at issue had an auxiliary axle added to help handle additional weight. *Id.* at *7. The axle was added after its original manufacture but before Henderson's injury. *Id.* Freightliner did not manufacture, design, or install the auxiliary axle. *Id.* Freightliner argued that the addition of the auxiliary axle substantially altered the truck because "it increased the likelihood that a malfunction or failure of the suspension system or its component parts would occur." *Id.* at *22-*23. Freightliner contended that such "a substantial alteration was an unforeseeable intervening and proximate cause of Henderson's injuries" that entitled it to summary judgment. *Id.* at *23. Judge Hamilton disagreed, concluding that Freightliner's evidence stopped "well short of claiming that the auxiliary axle actually contributed at all to the Henderson accident." *Id.*

month old son was asphyxiated when he became entangled in the harness straps of an infant swing.³⁴⁴ An investigation after the infant's death revealed that the harness straps had been tied in a fixed knot that prevented the harness from being properly adjusted.³⁴⁵

At trial, the district court issued a jury instruction which stated that to prevail on their product liability claim, the Tobers were required to show that the swing was not substantially altered at the time of the asphyxiation incident.³⁴⁶ On appeal, the Tobers argued that they were required only to show that the swing had not been substantially altered at the time of purchase.³⁴⁷ The Seventh Circuit disagreed.³⁴⁸ An element of the plaintiff's *prima facie* case under the IPLA is that the product was expected and did reach the consumer without substantial alteration.³⁴⁹ Thus, the court held that the IPLA required the Tobers to prove that the product: (1) was defective when it left the manufacturer; (2) remained in the same defective condition when used by the end user; and (3) was used in a manner the manufacturer intended.³⁵⁰ The *Tober* court went on to point out that a manufacturer is liable, therefore, only for "its own defects in the products and not for defects caused by the alteration or misuse of its products."³⁵¹ Accordingly, the court concluded that the district court's jury instruction was not improper.³⁵²

CONCLUSION

The 2006 survey period was a busy one for Indiana product liability practitioners and judges, and it produced some of the most well-reasoned and insightful decisions in recent memory. Although some questions linger when it comes to interpreting key provisions of the IPLA, the 2006 survey period shows that practitioners and judges continue to work diligently to clarify and resolve the remaining areas of uncertainty.

344. *Tober*, 431 F.3d at 574-75.

345. *Id.* at 575-76.

346. *Id.* at 579.

347. *Id.*

348. *Id.*

349. *Id.* at 579.

350. *Id.*

351. *Id.* at 580.

352. *Id.*

SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD*

I. INVESTIGATION OF GRIEVANCES: LAWYERS FAILING TO COOPERATE

Since the year 2000, there has been a provision in the procedural rules for attorney disciplinary action that requires lawyers to cooperate with Disciplinary Commission investigations, including a requirement to accept service of process.¹ In order to enforce the lawyer's duty to cooperate, the Indiana Supreme Court created a procedure whereby a non-cooperating lawyer is ordered to show cause why he or she should not be suspended from the practice of law until he or she decides to cooperate with the Disciplinary Commission's demand for information.² Even if the lawyer finally decides to cooperate with the

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1.

It shall be the duty of every attorney against whom a grievance is filed under this Section to cooperate with the Commission's investigation, accept service, comply with the provisions of these rules, and when notice is given by registered or certified mail, claim the same in a timely manner either personally or through an authorized agent.

IND. ADMIS. DISC. R. 23(10)(e) (2006).

2.

An attorney who is the subject of an investigation by the Disciplinary Commission may be suspended from the practice of law upon a finding that the attorney has failed to cooperate with the investigation.

- (1) Such a finding may be based upon the attorney's failure to submit a written response to pending allegations of professional misconduct, to accept certified mail from the Disciplinary Commission that is sent to the attorney's official address of record with the Clerk and that requires a written response under this Rule, or to comply with any lawful demand for information made by the Commission or its Executive Secretary in connection with any investigation, including failure to comply with a subpoena issued pursuant to sections 8(d) and 9(f) or unexcused failure to appear at any hearing on the matter under investigation.
- (2) Upon the filing with this Court of a petition authorized by the Commission, the Court shall issue an order directing the attorney to respond within ten (10) days of service of the order and show cause why the attorney should not be immediately suspended for failure to cooperate with the disciplinary process. Service upon the attorney shall be made pursuant to sections 12(g) and (h). The suspension shall be ordered upon this Court's finding that the attorney has failed to cooperate, as outlined in subsection (f)(1), above. An attorney suspended from practice under this subsection shall comply with the requirements of sections 26(b) and (c) of this rule.

Commission, the lawyer will be taxed for costs and a processing fee.³ Should lawyers neglect to pay those costs and fees, they can be suspended for that conduct as well.⁴ Assuming that a lawyer successfully survives the show cause proceeding described above (and continues to have a license in good standing), the lawyer can still face substantive disciplinary action for failing to respond to the Disciplinary Commission's demands for information. Indiana's Rules of Professional Conduct contain a provision identifying a violation of the rules where lawyers fail to respond to the Commission's otherwise lawful demands for information.⁵

By way of background, the Indiana Supreme Court suspended a lawyer from the practice of law for ninety days in September 2005 because of his repeated failures to respond to demands for information from the Disciplinary

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- (3) Such suspension shall continue until such time as (a) the Executive Secretary certifies to the Court that the attorney has cooperated with the investigation; (b) the investigation or any related disciplinary proceeding that may arise from the investigation is disposed; or (c) until further order of the Court.
 - (4) On motion by the Commission and order of the Court, suspension that lasts for more than six (6) months may be converted into indefinite suspension.

IND. ADMIS. DISC. R. 23(10)(f) (2006).

3. *Id.*

4. *Id.*

- (5) Upon the disposition of any show cause petition filed pursuant to paragraph (f)(2), above, resulting in either dismissal due to the respondent's subsequent cooperation or suspension from the practice of law, the Commission may seek an order reimbursing the Commission in the amount of \$500 plus out-of-pocket expenses for its time and effort in seeking the order in addition to all other costs and expenses provided for by Section 16 of this rule. An attorney who fails to pay the reimbursements, costs, or expenses assessed pursuant to this paragraph by the due date of the annual registration fee required by Admission and Discipline Rule 2(b) shall be subject to an order of suspension from the practice of law pursuant to Indiana Admission and Discipline Rule 2(h), and shall be reinstated only upon paying the outstanding reimbursements, costs and expenses and submitting to the Clerk a written application for reinstatement and payment of an administrative reinstatement fee of two hundred dollars (\$200).

Id.

5.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protect by Rule 1.6.

IND. PROF'L CONDUCT R. 8.1 (2006).

Commission. In *In re Clark*,⁶ the Disciplinary Commission made two demands for information on the lawyer, and he failed to submit any sort of timely response.⁷ He was the subject of two show cause proceedings like that described in Rule 23(10)(f) of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys, but also to the substantive disciplinary violation described in Rule 8.1 of the Indiana Rules of Professional Conduct. The opinion notes that the case was tried to conclusion, and the supreme court made its decision based on the findings of fact submitted by a Hearing Officer.⁸ The time involved in getting this respondent lawyer's case to judgment before the court was considerable.

At about the same time the *Clark* decision was handed down in September, the court suspended another lawyer for failing to respond to demands for information from the Disciplinary Commission. In late 2005, South Bend attorney Danny Ray Hill was suspended *indefinitely* after the Disciplinary Commission filed its eighth case against him for failing to cooperate.⁹ Approximately a month later, the Disciplinary Commission filed its ninth failure to cooperate case against the respondent.¹⁰ After the ninth case was filed, the court ordered the respondent to appear and show cause as to why he should not be held in contempt. In the court's subsequent opinion, it noted that the respondent had been the subject of more failure to cooperate proceedings than any other lawyer in Indiana.¹¹ The court then discussed the legal underpinnings of the various categories of suspensions that it employs in regulating the bar. The respondent in *Hill* had originally been suspended on the basis of one who fails to cooperate with an investigation into his or her professional misconduct. After his appearance before the court, however, he was found to be in contempt of the court, and his suspension was converted into one requiring him to go through the formal reinstatement process. The procedure to be followed for, petitioning for, and obtaining reinstatement are spelled out in Indiana Admission and Discipline Rule 23.¹² That process requires that the petitioning lawyer demonstrate a variety of skills and qualities that include demonstrable remorse and overall fitness to return to practice. In addition, it requires the lawyer to obtain a passing score on the Multistate Professional Responsibility Examination (MPRE).¹³ In short, it requires a lawyer to meet and exceed the same character

6. 834 N.E.2d 653 (Ind. 2005).

7. *Id.* at 654-55.

8. *Id.* at 654.

9. *In re Hill*, 840 N.E.2d 316 (Ind. 2006).

10. *Id.* at 317.

11. *Id.*

12. IND. ADMIS. DISC. R. 23(4)(b) (2006). The rule, inter alia, imposes the burden of proof on the petitioning lawyer to show by clear and convincing evidence that he or she is fit to be recommended to the profession and has a proper understanding of the standards imposed on members of the bar. One of the other key elements is a showing of remorse by trying to "make it right" with former clients. *Id.*

13. *Id.*

and fitness requirements needed when first seeking admission to enter the bar. Needless to say, reinstatement is not a “rubber stamp” process.¹⁴ One does not simply file a petition to be reinstated to the bar, then sit back and wait for the new license to arrive in the mail. As with the other cases described herein, the court used this opinion to speak to the bar at large about its expectations of lawyers involved in the disciplinary process.

Unfortunately, we are seeing a limited number of lawyers who do not timely respond to Commission requests for information. The Commission’s requests for information cannot be ignored and to do so is an independent violation of Ind. Professional Conduct Rule 8.1(b). As with the respondent in this case, lawyers who choose to disregard Commission requests will do so at their peril. In the future, we will have far less tolerance for lawyers who fail to cooperate timely with the Commission and, as here, will not hesitate to take significant action.¹⁵

The lawyer in *Hill* was suspended from the bar indefinitely and will have to clear the hurdles mentioned above before rejoining the practice of law.

II. ATTORNEY FEES: MEDICAL MALPRACTICE

During the survey period, the Indiana Supreme Court revisited the subject of attorney fees in medical malpractice cases. In *In re Stephens*,¹⁶ the respondent entered into a contingent fee contract with a client in 2001 that contained the following language:

The law limits the Attorneys’ fees to 15% of all sums recovered from the Patient Compensation Fund, though it does not restrict the amount of fees taken from the first \$100,000 of any recovery from the health care providers. The Client(s) agree to pay to the Attorneys as much of the first \$100,000 obtained from the health care providers as is necessary to equal one-third of the total recovery.¹⁷

In 2002, the lawyer (for reasons not stated in the opinion) had concerns about going forward with the medical malpractice case under the terms of the existing contingent fee contract. He proposed two alternatives to the client. One such option was for the client to pay the fee on an hourly basis. The client declined this option. The second alternative was to continue the representation under the terms of the original contingent fee contract, but the client would have to pay a \$10,000 “retainer” in order to continue to retain the firm’s services.¹⁸ The lawyer

14. See *In re Gutman*, 599 N.E.2d 604 (Ind. 1992).

15. *In re Hill*, 840 N.E.2d at 319.

16. 851 N.E.2d 1256 (Ind. 2006).

17. *Id.* at 1257.

18. The term *retainer* is undefined in Indiana’s Rules of Professional Conduct. Indeed, it is undefined in most states. The term is not used in Indiana Professional Conduct Rule 1.5 that governs the fees a lawyer may charge nor is it discussed in the rule’s attendant Comment. Although

also required that the \$10,000 payment be nonrefundable.¹⁹ Aside from the primary ethics issue with this fee agreement discussed shortly, the nonrefundable nature of the retainer is a clear violation of Indiana Professional Conduct Rule 1.5(a) as an unreasonable fee.²⁰ The court's reasoning on these arrangements is clear:

There may be circumstances where a nonrefundable retainer is enforceable, such as where the lawyer is precluded from other representation or where there is guaranteed priority access to the lawyer's advice, but these types of circumstances are not alleged here. *See, Matter of Thonert*, 682 N.E.2d 522, 524 (Ind. 1997). By locking a client to a lawyer with a nonrefundable retainer, the lawyer chills the client's right to terminate the representation.²¹

By 2004, the lawyer and client had a falling out, and the client demanded the return of both her file and the \$10,000 previously paid to the lawyer.²² He declined to return her money because of the nonrefundable nature of the payment.²³ In 2005, however, he relented (*after* disciplinary action had begun) and paid her the full \$10,000.²⁴ For purposes of this article, however, the significant feature of *Stephens* is the court's discussion of the structure of the respondent's fee for a medical malpractice case.

Indiana's Medical Malpractice Act²⁵ governs the procedures by which health care providers²⁶ can be sued for their professional errors in this state. This work is not intended to be a comprehensive treatise on Indiana's Medical Malpractice Act but some grounding in that area of law is necessary for understanding the significance of *Stephens*. Health Care providers are required to maintain malpractice insurance coverage up to certain monetary levels specified in the Act.²⁷ When a malpractice plaintiff recovers more than the health care provider's statutory share, the excess amount comes from Indiana's Patient Compensation

colloquially we think of a retainer as the payment made when the lawyer is initially hired, BLACK'S LAW DICTIONARY 1183 (5th ed. 1979) notes, "it can mean solely the compensation for services to be performed in a specific case." In this instance, the representation was over a year old before the subject came up.

19. *In re Stephens*, 851 N.E.2d at 1257.

20. The court gives its thoughts about non-refundable fee deals at length in *In re Kendall*, 804 N.E.2d 1152 (Ind. 2004).

21. *In re Stephens*, 851 N.E.2d at 1258.

22. *Id.* at 1257.

23. *Id.*

24. *Id.*

25. IND. CODE §§ 34-18-1 to -18 (2004). For purposes of this article, the current citations are used because the relevant concepts in *Stephens* have long been the same.

26. Physicians, nurses, hospitals and many others are all health care providers as that term is defined in Indiana Code § 34-18-2-14 (2004).

27. IND. CODE § 34-18-4-1.

Fund up to a prescribed maximum recovery of \$1.25 million.²⁸ The Medical Malpractice Act is clear that attorney fees from the fund are capped at fifteen percent of the recovery from the fund.²⁹ There are no exceptions. Said another way, if a malpractice plaintiff recovers more than the provider's share, their total recovery is made up of two components: the provider's share and the Patient Compensation Fund share. The law is clear that attorneys may not take fees of more than fifteen cents of every dollar that comes from the fund.³⁰ What about fees taken from the provider's share? The Act is silent as to that portion of the fee.

The 2001 contingent fee agreement in *Stephens* was explicitly structured so that a sliding scale would be applied to the provider's share of the recovery so that he would receive a final fee as close to one-third of the total recovery as mathematically possible.³¹ Bear in mind that in this case, the client terminated the respondent's representation and hired another lawyer, so there was no actual recovery to divide according to the fee agreement. The supreme court acknowledged that the Malpractice Act did not restrict the fee portion of the provider's share but found this to be an unreasonable fee under Indiana Professional Conduct Rule 1.5(a).³² Relying on the holding of a prior case, the

28. *Id.* § 34-18-14-3. The mechanics of the fund are irrelevant to this Article other than to note that the fund is comprised of surcharges on health care providers and is maintained by the State of Indiana's Department of Insurance. *Id.* §§ 34-18-6-1 to -7.

29. *Id.* § 34-18-18-1.

30. *Id.* The statute also allows an attorney to take fees on a *per diem* basis, but that is irrelevant to this discussion of *Stephens*.

31. *In re Stephens*, 851 N.E.2d 1256, 1257 (Ind. 2006). Using the current limits in the Medical Malpractice Act as an example, assume that a hypothetical plaintiff obtains a maximum recovery of \$1.25 million. If the act didn't exist and a lawyer was free to charge a client a fee of one-third of the total recovery, then the full fee would be \$416,666.67. Since the Act does exist, however, we know the Patient Compensation Fund portion of the recovery is \$1 million so the maximum attorney fee from the fund's share is \$150,000. Using the formula set out in the *Stephens* fee agreement, the lawyer would keep the *entire* provider's share of \$250,000 for a total fee of \$400,000. That is about \$16,000 below where a one-third contingent fee agreement would have otherwise left the lawyer.

32.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;

court found that attempting to circumvent the statute capping fees allowed from the Patient Compensation Fund was not proper.³³

The limitation on fees imposed by IC 34-18-18-1 cannot be overcome by merely manipulating the source of the fees. Regardless of the source of the fee, an attorney's compensation must still meet the reasonableness requirements of Prof. Cond. R. 1.5(a) and the 15% limitation of IC 34-18-18-1.³⁴

As a result of his manipulation of the fee contracted for with the client, the court imposed a sanction of a public reprimand on the lawyer.

Stephens is the latest in a series of cases that the supreme court has addressed on the subject of attorney fees in malpractice cases. Perhaps the earliest of these was the 1980 case of *Johnson v. St. Vincent Hospital*.³⁵ *Johnson* was not a disciplinary matter but a case involving the substantive provisions of Indiana's Medical Malpractice Act. Specifically, the lawyers in *Johnson* challenged the constitutionality of the fee limitation provision as a denial of due process and equal protection.³⁶ The court denied the challenge and reasoned that since the total amount recoverable by an injured patient is limited, the limitation on attorney's fees follows naturally as a means of protecting the already diminished compensation due to claimant and does not violate the due process and equal protection provisions of the Constitution.³⁷

Before *Stephens*, the court has had occasion to look at a case very similar to *Stephens*. In *Matter of Benjamin*,³⁸ a medical malpractice plaintiff signed an agreement with a lawyer who shared space with Benjamin. That contingent fee agreement called for the lawyer to receive forty percent of the "total recovery not to exceed attorney fee of 200,00 [sic]."³⁹ When Benjamin and the other lawyer parted company, Benjamin kept the client but did not execute a new contingent fee agreement.⁴⁰ The provider and the plaintiff eventually reached a settlement for \$100,000 to be paid in two payments of \$50,000 each.⁴¹ The lawyer in

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

IND. PROF'L CONDUCT R. 1.5(a) (2006).

33. *In re Stephens*, 851 N.E.2d at 1257 (citing *In re Benjamin*, 718 N.E.2d 1111 (Ind. 1999)).

34. *Id.* at 1257-58.

35. 404 N.E.2d 585 (Ind. 1980).

36. *Id.*

37. *Id.* at 602.

38. 718 N.E.2d 1111 (Ind. 1999).

39. *Id.* at 1112.

40. *Id.* Note that Rule 1.5(c) of the Indiana Rules of Professional Conduct requires the contingent fee agreements be in writing. Benjamin was also disciplined for failing to set out the manner in which the contingent fee would be calculated under the fee agreement. *Id.*

41. *Id.* This was the total statutory amount of the provider's share under the prior version of Indiana Code § 34-18-4-1.

Benjamin took \$40,000 of the first \$50,000 payment as his forty percent contingent fee.⁴² The court also noted that he took the money without considering the current value of future payments.⁴³ The respondent thereafter pursued a recovery with the Patient Compensation Fund and obtained a recovery for the client of \$335,000. When the Fund's check arrived, the lawyer kept \$134,000, which was forty percent of the recovery from the Fund's portion of the settlement.⁴⁴ The same fifteen percent limitation covered recoveries from the Fund at that time as well as at the time of *Stephens*.⁴⁵ Unlike *Stephens*, *Benjamin* actually got the money. He kept a total of \$174,000 out of the total recovery of \$435,000, which was exactly forty percent of the proceeds.⁴⁶ After he was informed about the fifteen percent limitation, he offered to return \$23,750, which would have reduced his total fee to approximately thirty-four percent of the whole.⁴⁷ The court still found that the respondent charged an unreasonable fee.⁴⁸ An important feature of the *Benjamin* opinion (especially when read in conjunction with *Stephens*) is Note 2 that gives some additional insight into the court's reasoning on contingent fees in medical malpractice cases:

Adopting his former partner's interpretation of the original fee agreement, the respondent attempted to retain as his fee \$100,000 of the \$100,000 settlement from the defendant hospital, in addition to 15 percent of the recovery from the Indiana Patient Compensation Fund. We find that approach to be an attempt to circumvent the statute limiting the recovery allowed from the Fund. By retaining as his fee an unreasonable portion of the recovery from the settlement with the hospital, the respondent would have effectively offset the 15 percent limitation on his fee from the Fund recovery.

We note, in any event, that an attorney's written disclosure to the client of the fee and the method by which it is to be determined is of key important in avoiding disputes over the reasonableness of a fee.⁴⁹

It is against this backdrop that *Stephens* was decided. The court found it "wholly improper" for the lawyer to attempt to circumvent the limit on fees relative to the Patient Compensation Fund by taking an increased percentage (potentially all) of the provider's share of a medical malpractice settlement.⁵⁰

42. *In re Benjamin*, 718 N.E.2d at 1112.

43. *Id.*

44. *Id.*

45. *Id.* The opinion refers to Indiana Code § 27-12-18-1 which was Indiana's Medical Malpractice Act at the time of the underlying case. The current statute is Indiana Code § 34-18-18-1 and mentioned *infra*.

46. *In re Benjamin*, 718 N.E.2d at 1112.

47. *Id.*

48. *Id.* at 1113.

49. *Id.* at 1113 n.2.

50. *In re Stephens*, 851 N.E.2d 1256, 1258 (Ind. 2006).

They found this part of the fee agreement to be unreasonable and worthy of a public reprimand.⁵¹ It is important for practitioners to note that in neither the *Johnson* case, the *Benjamin* case nor the *Stephens* case did the supreme court explicitly state what it believed a reasonable fee to be from the provider's share of a medical malpractice recovery. A plain reading of the opinions cited makes it clear that taking *all* of the provider's share is, in the court's view, unreasonable. It seems equally clear, however, that the court is not imputing the fifteen percent fee cap from the Patient Compensation Fund share of a recovery onto the provider's share where the legislature has not spoken. Only through some additional pronouncement by the court or the General Assembly will an explicit statement on the attorney fee from the provider's share be actually known beyond the "reasonable fee" language of Rule 1.5(a).⁵²

After the opinion in *Stephens* was handed down, the Indiana Trial Lawyers Association moved to intervene in the matter and briefed the question of the reasonable fee requirement as it relates to provider's share of any malpractice recovery. The supreme court had not issued a final order on the intervenor's matter at the time of submission of this survey.⁵³

III. EX PARTE COMMUNICATION WITH JUDGES

The general rule for lawyers has long been Rule 3.5(b) which forbids communication with judicial officers *ex parte* about a pending matter.⁵⁴ This kind of misconduct has, in years past, been so prolific so as to be the subject of commentary in prior survey articles.⁵⁵ Such communication undermines the fundamental fairness of the litigation process and, as such, has long been an

51. *Id.*

52. IND. PROF'L CONDUCT R. 1.5(a) (2006).

53. The court's online docket can be found at <http://www.in.gov/ai/law/>.

54.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate *ex parte* with such a person during the proceeding unless authority to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment.

(d) engage in conduct intended to disrupt a tribunal.

IND. PROF'L CONDUCT R. 3.5 (2006).

55. See Charles M. Kidd, *Survey of the Law of Professional Responsibility*, 35 IND. L. REV. 1477, 1477-81 (2002).

outlawed practice.⁵⁶ As noted previously, the majority of disciplinary cases involving *ex parte* communication with a judicial officer involve a family law issue—most commonly a child custody matter and, if one reviews the cases, the common scenario involves child custody matters in a post-decree environment.⁵⁷ This kind of conduct became so pernicious that the Supreme Court's Commission on Judicial Qualifications issued an advisory opinion to judges in 2001.⁵⁸ This advisory opinion explained the court's thinking about the judicial corollary to Rule 3.5 found in Canon 3 of the Code of Judicial Conduct. The Judicial Qualifications Commission spoke on this issue in strong terms and even reprinted the applicable rules that should guide judges' actions in these circumstances.⁵⁹ Clearly, this is a subject about which much has been written in the last several years.

During the survey period, the supreme court imposed a public reprimand on a respondent lawyer in *In re Ettl*.⁶⁰ Prior to the lawyer's involvement in the case, the wife had obtained a protective order against her husband.⁶¹ He violated the order, was arrested and released.⁶² A short time thereafter, the wife hired the respondent lawyer to formally pursue the dissolution case.⁶³ The lawyer then filed a petition to dissolve the marriage and another document, filed concurrently, called a Petition for Provisional Relief and Supervised Visitation.⁶⁴ This second document asked for two types of relief: (1) provisional relief including: temporary exclusive custody of their child, temporary exclusive occupancy of the marital home, child support, spousal support, supervised visitation for the father, and (2) an order granting emergency custody.⁶⁵ Ettl, the respondent's attorney, also presented a form order to the court that included language granting all the relief requested in the Petition but, most significant for this discussion, all of which would be awarded without notice to the husband.⁶⁶ Bear in mind that this point in time was the outset of the marriage dissolution case. Until there was an order from a trial court, the legal status of the parties was that of husband and wife or, more to the point, father and mother. Ignoring the protective order for

56. *Id.* at 1479 n.14.

57. By "post-decree environment" the author is referring to a period that is after the actual marriage dissolution decree, property settlement and child custody, visitation and child support orders have been entered. *See, e.g., In re Saint*, 785 N.E.2d 1101 (Ind. 2003); *In re Morton*, 770 N.E.2d 827 (Ind. 2002) (judicial disciplinary action); *In re Warrum*, 724 N.E.2d 1097 (Ind. 2000).

58. Advisory Opinion #1-01 from the Supreme Court Commission on Judicial qualifications. The opinion is reprinted in full as Appendix A to the 2001 professional responsibility survey cited in Kidd, *supra* note 55, at 1489.

59. Kidd, *supra* note 55, at 1489.

60. 851 N.E.2d 1258 (Ind. 2006).

61. *Id.* at 1259.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

a moment, their legal rights with respect to the child were equal. Even after the petition for dissolution and the petition for provisional relief were filed, no change in their legal status with respect to the child existed until there was an order granting a change in favor of one of the parties from the court.

The opinion in *Ettl* is clear that the respondent knew two addresses for the husband (that were not the marital residence) and that those were in the record before the trial court.⁶⁷ The opinion is also clear that Ettl did not attempt to give notice to the husband and that he, on behalf of the wife, was seeking an emergency change in the legal custody of the child from joint custody to sole custody.⁶⁸ Nowhere in the opinion does the supreme court reveal whether the respondent was successful in getting the trial court to grant the relief sought by the petitions. The mere fact that the written *ex parte* communication was made was sufficient to impose disciplinary sanction on the lawyer in *Ettl*. The court reiterated its reasoning in reaching this decision:

The presumption in every adversarial proceeding is that there is no *ex parte* communication with the judge, and that notice of any communication with the court will be given to all parties. As we recently explained in *In re Anonymous*, 729 N.E.2d 566, 569 (Ind. 2000) (quoting *In re Marek*, 609 N.E.2d 419, 420 (Ind. 1993)):

At the heart of our adversarial system of justice is the opportunity for both sides of a controversy to be fairly heard. “Improper *ex parte* communications undermine our adversarial system, which relies so heavily on fair advocacy and an impartial judge. [Such communications] threaten[] not only the fairness of the resolution at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice.”⁶⁹

Despite having two addresses for the husband, Ettl made no attempt to give the husband notice of the relief he was seeking. Ettl claimed that his statement in the petition that the husband was “at large in the community” satisfied whatever duty of notice might exist to either the husband or the trial court.⁷⁰ Obviously, the supreme court did not agree.

What is the lasting lesson of *Ettl*? Unlike the requirements of many other areas of law, a lawyer seeking *ex parte* relief on behalf of a client has a definite and personal role to play in pursuing that relief: “If respondent did indeed have legitimate reasons for not giving notice, Trial Rule 65(B)(2) required him to certify to the court, in writing, his claim that notice should not be given and the

67. *Id.* at 1260.

68. *Id.*

69. *Id.* The court noted at the end of the opinion, “Despite the statement of the requirements for obtaining a temporary restraining order set out in *In re Anonymous*, 786 N.E.2d 1185 (Ind. 2003), respondent, who acknowledges having a copy of that decision on his desk, did not follow its straightforward requirements.” *Id.* at 1261.

70. *Id.* at 1260-61.

reasons supporting his claim.”⁷¹ Trial Rule 65(B) provides:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) *the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.*⁷²

A plain reading of the opinion in *Ettl* reveals that the lawyer did not ask for a temporary restraining order under that name. A review of other cases in this area, however, reveals that the supreme court views these requests for *ex parte* relief as requiring compliance with Trial Rule 65.⁷³ Note that the rule is explicit in that it requires the affirmation by *the lawyer* that efforts to give notice were or were not made. This requirement makes the lawyer a necessary player in the process whereby litigants seek specific relief without giving notice to the other party. In that way the lawyer, by complying with the requirements of Trial Rule 65, might be viewed as something of a gatekeeper: The client cannot get the *ex parte* relief she seeks without the lawyer's certification that the request for such relief was handled properly. Again, we do not know from *Ettl* whether the trial judge granted the relief or not but the supreme court is saying in *Ettl* that the absence of the required certification under Trial Rule 65(B) should be a signal to the judge that the request for relief may not be properly before the court and should, therefore, be denied or at least delayed until some inquiry into the notice to the opposing party is made.⁷⁴ As noted at the outset of this section, this kind of misconduct by lawyers is pernicious and the supreme court will continue to issue opinions sanctioning lawyers who do not comply with the relatively simply certification process under Trial Rule 65.

IV. CONFLICTS OF INTEREST: THE HOT POTATO RULE

During the survey period, the supreme court decided the case of *In re Finderson*.⁷⁵ Although the actual decision is a short final order by the court, there are sufficient facts to glean the nature of the violation that led to the imposition of a public reprimand on the respondent lawyer. Client A.S. hired the lawyer to sue B.H. over injuries sustained in an automobile accident. The lawyer

71. *Id.* at 1261.

72. IND. TRIAL R. 65(b) (2006) (emphasis added).

73. *See supra* note 50.

74. *In re Ettl*, 851 N.E.2d at 1261.

75. 853 N.E.2d 476 (Ind. 2006).

sued B.H. in late 2001. B.H. was involved in another accident thereafter and hired the same lawyer to represent *her* in a claim against another driver. The lawyer did not consult with A.S. about the conflicting representation of B.H. before he undertook the representation. When the lawyer discovered the conflict of interest in representing the two clients, he withdrew from the representation of A.S. who, as it turns out, was incarcerated. Eventually, A.S.'s suit against B.H. was dismissed and the lawyer continued representing B.H. until a favorable settlement of her litigation was obtained. The lawyer in *Finderson* violated Rule 1.7(a) of Indiana's Rules of Professional Conduct and received a public reprimand.⁷⁶

The text of the former Rule 1.7(a) provided,

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relations with the other client; and

(2) each client consents after consultation.⁷⁷

The Comment to that section of the rule was entitled "Loyalty to a Client" and provided in relevant part:

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. This, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.⁷⁸

Although not denominated as such in the text of the opinion, the facts in *Finderson* illustrate a set of circumstances that invoke what has come to be colorfully named as the "hot potato rule."⁷⁹ The basic iteration of the rule is, "a firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."⁸⁰ The rule is applied in situations "when a firm has already undertaken concurrent conflicting representations, and seeks to covert one of its current into a former client on the spot, thus avoiding disqualification unless the matter it is handling for the clients are 'substantially related.'"⁸¹ The application of the Rules of Professional Conduct changes

76. *Id.*

77. IND. PROF'L CONDUCT R. 1.7(a) (2006).

78. IND. PROF'L CONDUCT R. 1.7(a) cmt. (2006).

79. The origin of the term has been credited to a U.S. District Court judge in *Picker International v. Varian Associates*, 670 F. Supp. 1363 (N.D. Ohio 1987), *superseded by Rule as stated in SST Castings, Inc. v. Amana Appliances, Inc.*, 250 F. Supp. 863 (S.D. Ohio 2002).

80. *Id.*

81. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.16:302 (1998).

somewhat when a client goes from the status of being a current client to the status of being a former client.⁸² The end result of analyzing these rules in light of *Finderson* is that when a lawyer represents conflicting interests between two (or more) current clients, the lawyer is not free to pick which client he or she would like to keep. As noted in *Picker International*, *infra*, a lawyer can't pick the lucrative client over the not-so-lucrative client.⁸³ In *Finderson*, the dropped "hot potato" client's case got dismissed while the other client's case eventually resulted in a settlement.⁸⁴

CONCLUSION

A majority of the 2005 survey was concerned with the Indiana Supreme Court's adoption of the American Bar Association's Ethics 2000 recommendation.⁸⁵ No such major rule overhaul was present during the relevant survey period, as it related to the substantive enforcement of Indiana's Rules of Professional Conduct or the procedural rules for pursuing lawyer disciplinary actions in the Rules for Admission to the Bar and the Discipline of Attorneys. The Indiana Supreme Court has addressed ethics matters that appear relatively straightforward on their face but cover much deeper and more intricate issues on closer examination. As cases like *Hill* and *Ettl* illustrate, there are deeper and subtler issues in play that deal with both law office management and bar management functions. *Stephens* deals with a fee issue that may warrant additional review in future survey editions.

82. See Rule 1.9 of the Indiana Rules of Professional Conduct for the requirements for treatment of conflicts of interest involving former clients.

83. See *supra* note 72.

84. *In re Finderson*, 853 N.E.2d 476 (Ind. 2006).

85. Donald R. Lundberg & Charles M. Kidd, *Survey of the Law of Professional Responsibility*, 38 IND. L. REV. 1255 (2005).

RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW

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This Article takes a topical approach to the notable real property cases in the courts of the State of Indiana in this survey period, October 1, 2005, through September 30, 2006, and analyzes noteworthy cases in each of the following areas: restrictive covenants, contracts, landlord/tenant law, governmental action and eminent domain, tax sales, mortgages, and developments in the common law.

I. RESTRICTIVE COVENANTS

A. *Fair Housing Act*

The Indiana Court of Appeals, in *Villas West II of Willowridge v. McGlothin*,¹ was confronted with a situation that began in 1996, when Algie and Edna McGlothin purchased a “duplex condo-style home” in Villas West II in Kokomo, Indiana (“Villas West”).² A set of restrictive covenants (the “Covenants”) for Villas West was recorded in 1992 by the developer.³ The Covenants provide that each unit may only be occupied by the owner and their immediate family and that owners are specifically prohibited from leasing their units.⁴ After both Algie and Edna moved into nursing homes in 1998, they leased their unit to a non-family member.⁵ Algie subsequently passed away.⁶ In 2002, Edna McGlothin (“McGlothin”) leased her unit to another non-family member for a term of three years.⁷ Shortly thereafter, the homeowner’s association for Villas West (the “Association”) notified McGlothin that she was in violation of the Covenants.⁸ McGlothin refused to cancel the lease, so the Association filed a complaint for injunctive relief.⁹ McGlothin admitted that she had leased her unit, but argued that the covenant was invalid and unenforceable because it

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1. 841 N.E.2d 584, 588 (Ind. Ct. App. 2006). Note: The Indiana Supreme Court had not granted transfer as of June 15, 2007, but held oral arguments on October 26, 2006. See Indiana Courts.org, Oral Arguments Online, <http://www.indianacourts.org> (Follow “Oral Arguments Online” hyperlink; then search “October 2006 Supreme Court.”).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 588 n.2.

7. *Id.* at 588.

8. *Id.* at 589.

9. *Id.*

evidenced an intention to make a preference, limitation, or discrimination among persons who could occupy dwellings within the subdivision based on race, color, sex, familial status, or national origin and that the covenant has a discriminatory effect on the availability of housing within the subdivision in violation of the Fair Housing Act.¹⁰

Following a bench trial, the court entered a number of findings of fact and conclusions of law. Selected findings of fact included:

13. Villas West II is a part of the Willowridge Community. Jim Bagley Construction Co., Inc. advertises the Willowridge Community as “Restricted—your investment is protected here.”

14. The word “restricted,” is defined by Webster’s Third International Dictionary (1993), as “limited to the use of a particular class of people or specifically excluding others (as members of a class or ethnic group felt to be inferior)(a residential area)(-hotels . . .” Other dictionary definitions include [“] . . . limited to white Christians,” and “. . . limited to or admitting only members of a particular group or class, esp. white gentiles.”

....

16. There are occasions where dwellings in Villas West II have been occupied by persons who were not members of the immediate family of the owner or contract purchaser. [examples omitted by author]

17. [The Association had knowledge that McGlothin had leased her unit from 1999 to 2002 and “did not complain during that three (3) year period.”]

....

19. Of the 149 lots in Villas West II, there are 147 owned by white persons and 2 by African Americans.

....

21. The covenants which remove housing units within Villas West II from the rental market effectively exclude the 1,036 African American householders who rent housing units from the subdivision. That is, 54% of all African American householders in Kokomo are excluded from the subdivision.

10. *Id.*

....

23. The covenants which remove housing units in Villas West II from the rental market effectively exclude the 1,446 racially minority householders who rent housing units in the City of Kokomo from the subdivision.

....

25. The covenants exclude 56% of racially minority householders from the subdivision, and only 34% White alone householders from the subdivision.

....

28. The covenants limit interracial association between residents of Villas West II and householders of minority races to those householders of minority races who are able to buy homes in the subdivision, to the total exclusion of racial minority households who could rent homes in the subdivision if homes were available.

....

37. The Court can find no legitimate non-discriminatory reason for limiting occupancy of dwellings within Villas West II to owners and members of their immediate families.¹¹

The trial court held, in part: "It is not fair to deny 1,446 racially minority householders who rent their homes, that is 56% of all racially minority householders, all opportunity to rent dwellings in Villas West II from owners in Villas West II who want to rent their dwellings."¹² The trial court also held that enforcement of the covenant would have harmed McGlothin because she "would have lost rent and her qualification for Medicaid unless she sold her home"; "Conversely, the Plaintiff suffers no conceivable harm by disallowing enforcement."¹³

On appeal, the substantive issue considered by the Indiana Court of Appeals was "whether the trial court's judgment that the restrictive covenant against leasing violated the Fair Housing Act¹⁴ [] is clearly erroneous."¹⁵ The Association cited a number of cases from "other jurisdictions holding that restrictive covenants prohibiting leasing of condominiums are, in general, valid

11. *Id.* at 591-94.

12. *Id.* at 594-95.

13. *Id.* at 594.

14. 42 U.S.C. §§ 3601-3619 (2000).

15. *Villas West II*, 841 N.E.2d at 597.

and enforceable.”¹⁶ Neither of the parties nor the court were able to locate any other cases which addressed whether a restrictive covenant barring leasing violates the Fair Housing Act.¹⁷ The Fair Housing Act provides that it is unlawful “to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”¹⁸

The court of appeals noted that there are two theories of discrimination under the Fair Housing Act: disparate treatment and disparate impact.¹⁹ The court proceeded to analyze the case under disparate impact, which is relevant when a “facially neutral policy or action has an unequal impact on different subgroups in the housing market.”²⁰ After a discussion of the Seventh Circuit jurisprudence in this area, the court proceeded to analyze the case using the factors set forth in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*²¹ (“*Arlington II*”). Those four factors are:

(1) how strong is the plaintiff’s showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*²² . . . (3) what is the defendant’s interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.²³

The court noted that these factors had been rephrased in *Phillips v. Hunter Trails Community Ass’n*, and proceeded with the updated factors:

(1) the strength of the plaintiff’s statistical showing; (2) the legitimacy of the defendant’s interest in taking the action complained of; (3) some indication—which might be suggestive rather than conclusive—of discriminatory intent; and (4) the extent to which relief could be obtained by limiting interference by, rather than requiring positive remedial measures of, the defendant.²⁴

With respect to the first factor, the court concluded that “the evidence presented at trial establishes that McGlothlin made a significant statistical

16. *Id.* at 598.

17. *Id.*

18. *Id.* at 598-99.

19. *Id.* at 599.

20. *Id.* (quoting *Phillips v. Hunter Trails Cmty. Ass’n*, 685 F.2d 184, 189 (7th Cir. 1982)).

21. 558 F.2d 1283 (7th Cir. 1977).

22. 426 U.S. 229 (1976).

23. *Villas West II*, 841 N.E.2d at 601 (citing *Arlington II*, 558 F.2d at 1290).

24. *Id.* (citing *Phillips*, 685 F.2d at 189-90).

showing of a disparate impact, and this factor weighs in favor of McGlothin.”²⁵ In connection with the second factor, the court noted that the developer of Villas West II testified that the unit was a “duplex condo-style home but not a true condominium,” without explaining the distinction.²⁶ The court then described a number of authorities, primarily from Florida, that demonstrate that condominiums are treated differently from single-family, detached homes.²⁷ Since even McGlothin’s expert at trial testified that leasing can have an “adverse effect” on property values²⁸ and because restrictions contained within a declaration of condominium have traditionally been “clothed with a very strong presumption of validity when challenged,”²⁹ the court found that the second Arlington II factor weighed in favor of the Association.³⁰

In its discussion of the third factor, indication of discriminatory intent, the court noted the trial court’s findings with respect to the advertisement that Villas West II was “Restricted” and the dictionary definitions of “restricted” cited by the trial court in its findings of fact.³¹ The court concluded that the third factor weighed “slightly” in favor of McGlothin.³² With respect to the final factor, the court noted that the trial court made no relevant findings, but that relief could be obtained in this case by preventing the Association from enforcing the restrictive covenant, rather than by requiring the Association to take remedial action.³³ This factor, then, weighed in favor of McGlothin.³⁴

The court then turned to the second part of its analysis, considering first whether McGlothin had made a *prima facie* showing of disparate impact, then whether the Association had proven a bona fide and legitimate justification for the housing action.³⁵ If the Association made that showing, then the plaintiff had the burden to show that less discriminatory alternatives were available.³⁶ As discussed with respect to the first *Arlington II* factor, the court found that McGlothin’s statistics demonstrated a disparate impact.³⁷ As discussed with respect to the second *Arlington II* factor, the court found that the Association had a bona fide and legitimate justification for the restrictive covenant—protecting property values.³⁸

25. *Id.* at 604.

26. *Id.*

27. *See id.* at 604-05.

28. *Id.* at 605.

29. *Id.* (quoting *Woodside Vill. Condo. Ass’n, Inc. v. Jahren*, 806 So. 2d 452, 457 (Fla. 2002)).

30. *Id.*

31. *See id.* at 605-06.

32. *Id.* at 606.

33. *Id.*

34. *Id.*

35. *See id.*

36. *Id.*

37. *Id.* at 607.

38. *Id.*

Finally turning to the question of whether less discriminatory alternatives were available, the court noted that the trial court found that the restrictive covenants contained a number of requirements for owners to maintain their units, including exterior maintenance, watering of lawns and shrubs, and prohibited uses and nuisances.³⁹ The trial court found that “if the basis for the leasing covenant is to maintain property values because renters do not care for the residences as well as owners, the properties can be maintained just as well through the covenants listed above.”⁴⁰ The court determined that it could not find this conclusion to be clearly erroneous.⁴¹ The court took care to note that although it affirmed the trial court’s decision that this restrictive covenant violated the Fair Housing Act, it thought this was a “close case.”⁴² “[W]e do not intend to imply that all restrictive covenants prohibiting leasing violate the federal Fair Housing Act. Rather, this is a complex, fact-sensitive analysis that should not be taken to apply to all such covenants.”⁴³

Stepping back from the mechanics of the application of the test used by the court of appeals, the threshold question is whether the application of the Fair Housing Act to the restrictive covenant was the appropriate inquiry. The court noted that “neither party cites authority directly on point, and our research likewise reveals no relevant authority on this issue.”⁴⁴ In other words, *Villas West II* is the first appellate case to even discuss the possibility that a restrictive covenant which prohibits leasing could violate the Fair Housing Act. Because the court did not discuss any allegations that a specific racial minority was denied the right to rent or purchase a home in the complex, it follows that the court must have believed that the restrictive covenant “otherwise [made] unavailable . . . a dwelling . . . because of race, color. . .” Essentially, the court noted, the question under a disparate impact claim is whether the restrictive covenant “has a significantly greater discriminatory impact on members of a protected class.”⁴⁵ The key word in that test, which the court never explicitly discusses, is “impact.” The record included findings of fact that clearly showed a correlation between a person’s race and such person’s likelihood to rent rather than own a dwelling in Kokomo. However, the court never discussed whether this statistical correlation had any impact at all on the availability of a dwelling in Villas West II to a member of a racial minority. In the case of McGlothin herself, the court never mentioned the race of the unrelated person to whom McGlothin rented her unit. If that person was a member of a racial minority and was prevented from living in Villas West II as a result of the application of the restrictive covenant, that certainly would have made it easier to find an impact.

The court spent several pages detailing the trial court’s findings of fact with

39. *Id.*

40. *Id.* at 608.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 598.

45. *Id.* at 600.

respect to the first prong of the *Arlington II* test, and noted that the trial court concluded that: ““The statistics that [McGlothin] presented to the Court clearly prove that the restriction has a significantly greater negative impact on African American members of this community than it does on the Caucasian population.””⁴⁶ The court of appeals agreed that the evidence supported that finding. Statistics can be powerful tools and are essential to providing a disparate impact claim. However, there is a big gap in reasoning in this case—a missing link between the statistics and a finding of disparate impact. Undeniably, whites and African American rent and own their dwellings at different rates in Kokomo. However, to conclude that “54% of all African Americans householders in Kokomo are excluded from the subdivision”⁴⁷ assumes that there is some reason that African Americans rent in higher numbers than whites that is caused by race rather than by personal choice or economic necessity. The restrictive covenant makes no unit in Villas West II unavailable to any person per se. The statistics presented by McGlothin only prove that the restrictive covenant has a potentially greater negative impact on African American members of the community than it does on the Caucasian population. Apparently no evidence was presented which showed that a disproportionate number of African Americans or other racial minorities: (1) desired to live in Villas West II; (2) could afford to rent a unit there; and (3) could not afford to purchase a unit there.

Although the court of appeals cautioned that it did not intend to imply that all restrictive covenants prohibiting leasing violate the Fair Housing Act and that this was a “complex, fact-sensitive analysis,”⁴⁸ it appears that the key fact driving the outcome of the application of the *Arlington II* test was the fact that African Americans rent in a higher proportion than whites in Kokomo. According to the U.S. Census Bureau, the homeownership rates in Kokomo (i.e. 46% of African Americans own their homes while 66% of whites own their homes) is actually slightly less disparate than the national average. In 1996, 65.4% of all householders in the United States owned their homes, including 69.1% of whites and 44.1% of African Americans.⁴⁹ If the key fact is the same across the United States, how would the outcome of the application of the *Arlington II* test to a similar restrictive covenant differ?

The Indiana Supreme Court heard oral arguments in *Villas West II* on October 26, 2006, but has not yet granted transfer. The authors look forward to discussing the Supreme Court's opinion in the next survey article.

B. Continuing Liability of Predecessor Developer

A second case concerning restrictive covenants decided by the Indiana Court

46. *Id.* at 603 (quoting Appellant's App. at 20).

47. *Id.*

48. *Id.* at 608.

49. Robert R. Callis, *Moving to America—Moving to Homeownership*, U.S. CENSUS BUREAU (Sept. 1997), <http://www.census.gov/prod/3/97pubs/h121-972.pdf>.

of Appeals is *Paniaguas v. Endor, Inc.*⁵⁰ In this case, Aldon developed the Fieldstone Crossing subdivision, encumbered the lots with a reciprocal easement agreement and sold a lot to Paniaguas.⁵¹ Subsequently, Aldon sold its remaining interests in Fieldstone Crossing to Endor.⁵² Endor assumed the responsibility to “sustain the high quality of properties in accordance with the real covenants.”⁵³ Paniaguas then brought an action against Endor and Aldon, alleging that Endor constructed homes of an inferior quality.⁵⁴ Aldon moved to dismiss itself pursuant to Indiana Trial Rule 12(B)(6).⁵⁵ The trial court granted the motion and Paniaguas appealed.⁵⁶

Paniaguas argued that Aldon had a duty to the homeowners to ensure that Endor would adhere to the covenants in the subdivision and by failing to do so, should be held liable in tort.⁵⁷ The court affirmed the trial court and failed to find a tort upon which relief could be granted.⁵⁸

The court found that “[o]n balance, the relationship between the parties, the foreseeability of harm, and sound public policy counsel against the extension of a duty to developers to insure that real covenants are adequately enforced upon subsequent developers.”⁵⁹

Paniaguas also argued that Aldon breached its purchase agreement with the homeowners because it could not delegate or assign to Endor its contractual duties.⁶⁰ The court declined to conclude that “Aldon’s personal development of the Fieldstone Crossing subdivision is so essential to the purchase agreements between Appellants and Aldon as to preclude the assignment of the obligation to Endor.”⁶¹

Paniaguas also filed suit concerning this transaction in the U.S. district court.⁶² This suit claims, among other things, that Aldon violated the Interstate Land Sales Full Disclosure Act⁶³ and that Paniaguas is entitled to rescind the purchase agreement and obtain other damages.⁶⁴ Aldon and the other defendants moved for summary judgment on the grounds that the transaction met one of the several exemptions provided for under the Act, including specifically, that Aldon

50. 847 N.E.2d 967 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 593 (Ind. 2006).

51. *Id.* at 969.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 970.

58. *Id.*

59. *Id.* at 971.

60. *Id.* at 972.

61. *Id.* at 973.

62. *Paniaguas v. Aldon Cos. (Paniaguas II)*, No. 2:U4-CV-468-PKC, 2006 WL 2568210 (N.D. Ind. Sept. 5, 2006).

63. 15 U.S.C. §§ 1701-1720 (2000).

64. *Paniaguas II*, 2006 WL 2568210 at *1.

did not utilize any means of interstate commerce in connection with sales of the property.⁶⁵

II. CONTRACTS

A. *Waiver of Subrogation*

In *S.C. Nestel, Inc. v. Future Construction, Inc.*,⁶⁶ the Metropolitan School District of Perry Township in Marion County contracted with Future Construction, Inc., a general contractor, to construct a warehouse.⁶⁷ The Perry Township/Future contract contained the standard American Institute of Architects (AIA) waiver of subrogation provision.⁶⁸ Future then contracted with S.C. Nestel as a subcontractor to construct the warehouse.⁶⁹ The Future/Nestel subcontract contained a standard AIA provision that prohibited Nestel from assigning or subcontracting without the written consent of Future.⁷⁰ It also included a provision which required Nestel to obtain general liability insurance.⁷¹ The Perry Township/Future contract was incorporated by reference into the Future/Nestel subcontract.⁷² Nestel then “contracted with Coffey Construction, Inc. . . . as a sub-subcontractor to construct the warehouse.”⁷³ Future had no contractual relationship with Coffey.⁷⁴

While Coffey was building the warehouse, it collapsed.⁷⁵ “MSD Perry Township paid Nestel \$17,214 for demolition and removal of debris, and Future reimbursed MSD Perry Township” through its builder’s risk insurance policy.⁷⁶ Future filed a lawsuit against Nestel and Coffey alleging that they “were negligent and responsible for the collapse and damage to the warehouse and that they breached their contracts” by not carrying appropriate insurance.⁷⁷ Nestel moved for summary judgment, arguing that the waiver of subrogation clause indicated that the “intent of the parties ‘was to allocate the risk of damage to the building during construction by the provision of property or builders risk insurance by either the owner or the general contractor.’”⁷⁸ The trial court denied Nestel’s motion for summary judgment and “denied Nestel’s request to certify

65. *Id.* at *7.

66. 836 N.E.2d 445 (Ind. Ct. App. 2005).

67. *Id.* at 447.

68. *Id.* at 447-48.

69. *Id.* at 447.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 448.

78. *Id.* at 448-49.

the issue for interlocutory appeal.”⁷⁹

Following trial, the court found in favor of Future and “found that the waiver of subrogation clause had been ‘superseded by Nestel’s breach of its contract with Future by subcontracting work to Coffey without notice to Future and by the negligent acts of Nestel and Coffey which led to the collapse of the Warehouse.’”⁸⁰ Nestel appealed.⁸¹

The court of appeals quoted *South Tippecanoe School Building Corp. v. Shambaugh and Son, Inc.* for the proposition that a “builder’s risk insurer is not entitled to subrogate against one whose interests are insured even though the party’s negligence may have occasioned the loss, in the absence of design or fraud.”⁸² The court in *S.C. Nestel* explained that in short, “such contracts place the risk of loss from the project on the insurance, not on the insured.”⁸³

In this case, the court of appeals found that the contracts reveal “that it was the intent of MSD Perry Township, Future, and Nestel to allocate the risk of damage during construction through property or builder’s risk insurance held by either MSD Perry Township or Future.”⁸⁴ Therefore, “it makes no difference whether the theory of recovery is negligence or breach of contract—the waiver of subrogation provision bars recovery.”⁸⁵ The court of appeals held that Nestel’s breach of contract by subcontracting without consent did not supersede the waiver of subrogation.⁸⁶ The judgment of the trial court was reversed.⁸⁷

B. Successor Liability

Stainbrook v. Low concerns a purchase agreement for forty acres.⁸⁸ Three days before closing, the seller died and the estate refused to consummate the purchase agreement.⁸⁹ The buyer filed a claim against the seller’s estate.⁹⁰ Following a trial, the court awarded specific performance to the buyer.⁹¹ The seller’s estate appealed, arguing, among other things, that the trial court erred in awarding specific performance because the seller was eighty-nine years old and the buyer was twenty-two years old.⁹² After dispensing with the estate’s

79. *Id.* at 449.

80. *Id.*

81. *Id.*

82. *Id.* at 450 (quoting *S. Tippecanoe Sch. Bldg. Corp. v. Shambaugh & Son, Inc.*, 395 N.E.2d 320, 328 (Ind. App. 1979)).

83. *Id.*

84. *Id.* at 451.

85. *Id.*

86. *Id.* at 452.

87. *Id.* at 453.

88. 842 N.E.2d 386 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1009 (Ind. 2006).

89. *Id.*

90. *Id.*

91. *Id.* at 391.

92. *Id.* at 398.

arguments, which were not particularly noteworthy, the court of appeals affirmed the trial court's ruling.⁹³

This case is interesting because it did not consider whether the buyer had an adequate remedy at law. Instead, it cited a 2000 court of appeals case for the proposition that:

The decision whether to grant specific performance is a matter within the trial court's sound discretion. Because an action to compel specific performance sounds in equity, particular deference must be given to the judgment of the trial court. Specific performance is a matter of course when it involves contracts to purchase real estate.⁹⁴

This is very different than the 2003 *Kesler v. Marshall*⁹⁵ decision, in which the court of appeals acknowledged that while the trial court has such discretion, "[s]uch judicial discretion is not arbitrary, but is governed by and must conform to the well settled rules of equity."⁹⁶ Those "well-settled rules" include the notions that equitable remedies like specific performance are "extraordinary" remedies and that they are "not available as a matter of right."⁹⁷ Instead, equitable remedies are only available when no adequate remedy at law, i.e. monetary damages, exists.⁹⁸ "Where substantial justice can be accomplished by following the law, and the parties' actions are clearly governed by rules of law, equity follows the law."⁹⁹

By failing to address whether the buyer had an adequate remedy at law or whether such a question is necessary, the *Stainbrook* decision perpetuates the uncertainty regarding the availability of equitable remedies for the breach of real estate agreements in Indiana.

C. Specific Performance

In *Gabriel v. Windsor, Inc.*,¹⁰⁰ Windsor is a developer and residential home builder that developed a residential subdivision in northeast Indiana. Gabriel contracted to purchase a lot from Windsor and to have Windsor construct a custom home as designed by her architect.¹⁰¹ A number of problems arose during construction.¹⁰² After the home was substantially complete and a punch list had been signed by Gabriel, she sent Windsor a letter terminating the contract due to

93. *Id.*

94. *Id.* at 394 (citing *Ruder v. Ohio Valley Wholesale, Inc.*, 736 N.E.2d 776, 779 (Ind. Ct. App. 2000)) (citations omitted).

95. 792 N.E.2d 893 (Ind. Ct. App. 2003).

96. *Id.* at 897.

97. *Id.*

98. *Id.*

99. *Id.*

100. 843 N.E.2d 29 (Ind. Ct. App. 2006).

101. *Id.*

102. *Id.*

a number of specified “material breach.”¹⁰³ Windsor sued to compel Gabriel to perform her obligations under the contract.¹⁰⁴ After a trial, the court ruled in favor of Windsor and ordered Gabriel to specifically perform her obligations under the contract within thirty days.¹⁰⁵ Gabriel appealed, arguing that the trial court’s decision was clearly erroneous and that the trial court’s grant of specific performance was clearly erroneous.

The court of appeals found that Gabriel was not entitled to rescind the contract because she did not show that Windsor refused to perform its obligations.¹⁰⁶ Instead, the appellate court found that Windsor had agreed to remedy the disputed items and was prevented from doing so because of heavy rains.¹⁰⁷ Beginning its discussion of the specific performance issue, the court reiterated that the decision to award specific performance is within the trial court’s discretion and that a party seeking specific performance must show that it substantially performed its contractual obligations or offered to do so.¹⁰⁸ The court found that the trial court erred because it ordered Gabriel to grant a drainage easement to Windsor for the benefit of the adjoining lot, a term which was not a part of the original contract.¹⁰⁹ If specific performance is ordered the terms of the agreement must be enforced, but the trial court does not have the authority to change the terms.¹¹⁰

Finally, the court suggested that “[o]n remand, the trial court should consider an award of damages rather than specific performance”¹¹¹ and cited *Kesler v. Marshall*.¹¹² The court did not address whether the grant of specific performance was clearly erroneous because the trial court made no finding that Windsor did not have an adequate remedy at law.

D. Election of Remedies

*UFG, LLC v. Southwest Corp.*¹¹³ represents the second trip made by the parties to the court of appeals. The case first arose when the plaintiffs (“Buyers”) contracted to purchase real estate from Southwest (“Seller”).¹¹⁴ Buyers sued for specific performance and legal damages. The trial court found in favor of Seller. Seller then consummated a sale of the property to a third party. Buyers appealed, and the court of appeals held that there was an

103. *Id.* at 33, 38.

104. *Id.* at 33.

105. *Id.* at 49.

106. *Id.* at 47.

107. *Id.*

108. *Id.* at 48.

109. *Id.* at 48-49.

110. *Id.*

111. *Id.* at 49.

112. 792 N.E.2d 893, 897 (Ind. Ct. App. 2003).

113. 848 N.E.2d 353 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 592 (Ind. 2006).

114. *Id.* at 357.

enforceable contract and that Buyers were entitled to specific performance or damages.¹¹⁵ The trial court concluded that the remedy of specific performance was no longer available because the property had been sold and held that Buyers were not entitled to legal damages because it had “elected” the remedy of specific performance.¹¹⁶ Buyers appealed again.

The court of appeals agreed with the trial court that specific performance is not available to the Buyers because the real estate is beyond the control of the parties.¹¹⁷ Buyers argued that a third party who purchases property with notice of ongoing litigation concerning the property takes the property subject to the outcome of any appeal. The court did not address the merits of this argument as it applied to the case because the third party was not made a party to the litigation, thus leaving open the question of whether the Buyers could have been successful if they had filed an action against the third party.¹¹⁸

The court acknowledged that the election of remedies doctrine “provides that where a party has two coexisting but inconsistent remedies and elects to prosecute one such remedy to a conclusion, he may not hereafter sue on the other remedy.”¹¹⁹ However, the court found that in this case, the Buyers never “elected” specific performance as a remedy and pursued both equitable and legal remedies throughout the proceedings.¹²⁰ Indeed, “the denial of both remedies of specific performance and legal damages under the circumstances before us is a miscarriage of justice we should not condone.”¹²¹ The court remanded for a determination of monetary damages, if any.

E. Allocation of Real Estate Taxes

In *Trinity Homes, LLC v. Fang*,¹²² Trinity Homes owned a parcel of real estate that it developed into a residential subdivision. Fang executed a purchase agreement for a lot in the subdivision. The purchase agreement included the following provision:

[A]ll real estate taxes and assessment, if any, including penalties and interest, which are due and payable with respect to the real estate will be paid by Seller at the closing. Seller agrees to pay first real estate installment due after settlement. Purchaser agrees to pay taxes and assessments thereafter.¹²³

Real estate taxes were assessed as of March 1 each year and were due and

115. *Id.* at 357-58.

116. *Id.* at 360.

117. *Id.* at 361.

118. *Id.*

119. *Id.*

120. *Id.* at 365.

121. *Id.* at 363.

122. 848 N.E.2d 1065 (Ind. 2006).

123. *Id.* at 1067.

payable in May and November. Fang closed on his lot on March 3, 2000. Trinity Homes paid both the May and November 2000 assessments, which were based on the March 1, 1999 assessment conducted before the tract was subdivided into lots. Fang paid the May 2001 tax bill, but argued that under the terms of the purchase agreement it was Trinity Homes' responsibility. Fang sued Trinity Homes in small claims court, arguing that his lot was first assessed as a separate lot on March 1, 2000, that assessment was not due and payable until May and November 2001 and that the purchase agreement provided that Trinity Homes would pay the May 2001 payment.¹²⁴ The trial court found in favor of Fang.¹²⁵ The court of appeals affirmed the trial court in an unpublished memorandum, and the supreme court granted transfer.¹²⁶

The trial court and the court of appeals found the tax provision to be ambiguous and construed it against the drafter, Trinity Homes.¹²⁷ The supreme court did not find the provision to be ambiguous.¹²⁸

We think there is no serious question that the May 2000 installment was the first installment of any real estate tax that was due and payable after the March 3, 2000 closing on Fang's lot. The only issue is whether the installment was the first due and payable 'with respect to the real estate,' i.e., on Fang's Lot 38.¹²⁹

The court found that the fact that a separate assessment of Fang's lot had not occurred as of the closing did not relieve Lot 38 of its obligation for the taxes for the entire tract—the State acquired a lien for the entire tract on March 1, 1999.¹³⁰ If the taxes had not been paid, the entire tract, including Lot 38, would have been subject to collection procedures. In the court's view, Trinity's payment of the November 2000 installment was a "windfall" to Fang as that installment was his responsibility.¹³¹

Justice Rucker dissented from the court's decision:

The record is clear that Lot 38 did not exist as a separate taxable parcel on March 1, 1999. As a consequence, there obviously were no taxes due and payable on the lot at the time of the March 3, 2000 closing date. Rather, the first installment of real estate taxes due and payable on this lot was May 10, 2001 based upon the March 1, 2000 assessment date. Under the express terms of the parties' Agreement these taxes were Trinity Homes' responsibility. The trial court reached the right

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1068.

128. *Id.*

129. *Id.* at 1069.

130. *Id.*

131. *Id.*

conclusion, and its judgment should therefore be affirmed.¹³²

III. LANDLORD/TENANT LAW

A. *Tenant's Trade Fixtures*

Ordinarily, title to any trade fixtures left by a tenant at leased premises following the termination of a lease will merge with the real estate and become the property of the landlord.¹³³ The Indiana Supreme Court addressed that general rule in the context of a tort claim by an injured employee of the tenant in *Dutchmen Manufacturing, Inc. v. Reynolds*.¹³⁴ The employee was injured when he was struck by a portion of scaffolding which had been erected at the manufacturing plant leased to his employer, Keystone RV, Inc., by the prior tenant of the plant, Dutchmen Manufacturing, Inc. The owner of the plant, Chapman Realty, Inc., had leased the plant to Dutchmen from 1992 through 1999. During its tenancy, Dutchmen erected the scaffolding for its manufacturing processes. As the end of the term of Dutchmen's lease neared, Chapman initially requested that Dutchmen remove the scaffolding at the end of the term. However, Chapman commenced negotiating with Keystone to lease the plant and Keystone expressed an interest in having the scaffolding remain at the premises. Dutchmen then offered to sell the scaffolding to Keystone, but Keystone elected not to acquire it from Dutchmen. Instead, Dutchmen vacated the Premises and left the scaffolding in place.¹³⁵

Keystone then entered into a lease for the plant with Chapman on an "as is" basis and began using the scaffolding. The case came to the supreme court through an interlocutory appeal of the denial of Dutchmen's motion for summary judgment.¹³⁶ The injured Keystone employee claimed that Dutchmen was liable as the supplier of the property.¹³⁷ Dutchmen argued that it was not the owner or supplier of the property, rather the owner was Chapman because the scaffolding merged with the real estate owned by Chapman when Dutchmen left it at the premises upon termination of the lease of the premises.¹³⁸ The court acknowledged the general rule, stated above, that any trade fixtures of a tenant left at the expiration of the term of a lease merge with the real estate and become the property of the landlord; however, where the landlord consents to allowing the tenant to leave the trade fixture at the premises at the end of the lease term, ownership does not merge with landlord but remains with the tenant who may remove the trade fixtures within a reasonable time after the end of the lease

132. *Id.* at 1070.

133. *Dutchmen Mfg., Inc. v. Reynolds*, 849 N.E.2d 516, 520 (Ind. 2006).

134. *Id.* at 516.

135. *Id.* at 518.

136. *Id.*

137. *Id.* at 519.

138. *Id.* at 524.

term.¹³⁹ The court found in this case that the facts indicated that the landlord did consent to allow the scaffolding to remain at the premises and Dutchmen, having a reasonable time to remove it, elected to transfer the scaffolding to Keystone and save the cost of removal.¹⁴⁰

The court's decision highlights the need for both tenants and landlords to clearly describe and set forth their intentions regarding any property left at the premises at the time of the termination of the term of the lease and to follow a course of action that clearly demonstrates that intent. Obviously removal of trade fixtures will preclude a tenant from future liability and is the safest course. If the trade fixture will not be removed then tenants should make certain that either the landlord will accept title or that the next user of the trade fixture will accept title to the trade fixture and, in either case, such party indemnifies the tenant from any loss occasioned from the use of the trade fixture.

The landlord in *Reynolds* apparently never wavered from the position that Dutchmen needed to remove the scaffolding thereby preventing the trade fixture from becoming a part of the real estate and avoiding any liability arising from its use. To fully protect itself, the landlord should have specifically disclaimed any ownership of the scaffolding in the lease with Keystone and clarified that it was not part of the leased premises and with required removal at the end of the term of the lease by Keystone.

An issue suggested by this case, but not addressed, is the liability of a landlord in a situation where the tenant is not required to remove a trade fixture and the landlord allows such trade fixture to be merged with the real estate under the general rule cited above. If that trade fixture truly merges with the real estate, then it should lose its character as personal property and become part of the real estate. As such, there should be no claim for products liability that can be assessed against the landlord; instead, the landlord's potential liability would be for any unsafe condition of the real estate, which is a much less stringent standard of liability.

B. Exclusive Use Rights

*Simon Property Group, L.P. v. Michigan Sporting Goods Distributors, Inc.*¹⁴¹ involved a situation where in 2001, Simon entered into a fifteen-year lease with MC Sports for space in Tippecanoe Mall in Lafayette. The lease included an exclusive use clause which specified that if Simon permitted or suffered the operation of a "full-line" sporting goods store in the Mall, MC Sports would have the right to pay alternate rent (four percent of gross sales) until the competing use stopped operating in the center.¹⁴²

In 2004, Simon entered into a lease with Dick's Sporting Goods. MC Sports informed Simon that this was a breach of the lease and apparently threatened to

139. *Id.* at 520-21.

140. *Id.* at 522.

141. 837 N.E.2d 1058 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1003 (Ind. 2006).

142. *Id.* at 1061.

terminate its lease. Simon filed an action for a declaratory judgment, asking the court to confirm that MC Sports' only remedy was to pay alternate rent.¹⁴³ The trial court granted Simon summary judgment and held that MC Sports' sole remedy was to pay alternate rent. MC Sports appealed.¹⁴⁴

The court of appeals struggled with the terms of the lease and Indiana law. In particular, the court noted that Section 3.3 of the lease, which dealt with certain potential events of default by tenant, including a failure to open by a particular date, provided that "[a]ll remedies in this Lease or at law provided shall be cumulative and not exclusive."¹⁴⁵ Section 3.3 was not a general remedies provision. Section 24.23, which contained the exclusive use provision, only mentioned a single remedy, alternate rent, and did so with apparently permissive language: "If Landlord violates or suffers the violation of this paragraph . . . Tenant shall have the right to pay in lieu of Minimum Rent . . ."¹⁴⁶ Section 24.23 did not contain specific language that the payment of alternate rent was tenant's "sole" or "exclusive" remedy, nor did it specifically exclude other potential remedies.¹⁴⁷

Simon argued that three different provisions included specific remedies for specific breaches by tenant or landlord: Sections 8.1, 8.7, and 24.23. If the "all remedies are cumulative" language from Section 3.3 applied to Section 24.23, Simon argued that it applied to all three provisions.¹⁴⁸ The court of appeals agreed. Unfortunately for MC Sports, a representative of the company apparently testified that if MC Sports violates Section 8.1 or 8.7, Simon has no remedy available except as specifically set out in such section. "In light of that admission," the court held, "we decline MC Sports' invitation to apply the language from Section 3.3 to modify only Section 24.23."¹⁴⁹

The court of appeals noted that under Indiana law:

[A] contract which excludes some remedy given by law should be so definite and positive in its terms as to show the clear intention of the parties to do so." Therefore, even if a lease provides a specific remedy, a landlord has not been deprived "of any rights given by law, unless the terms thereof expressly restricted the parties to such specified remedy."¹⁵⁰

In a dissent in part, Chief Judge Kirsch disagreed with the majority's analysis, noting that "[t]he parties to this lease are sophisticated, commercial entities, dealing at arms length, represented by competent counsel. They clearly had the opportunity and ability to set out explicitly any limitation on remedies.

143. *Id.*

144. *Id.* at 1065.

145. *Id.* at 1071.

146. *Id.*

147. *Id.*

148. *Id.* at 1073.

149. *Id.* at 1074.

150. *Id.*

They did not.”¹⁵¹

C. Tenant's Exercise of Option to Purchase

The recent case of *Pinkowski v. Calumet Township of Lake County*¹⁵² discusses the importance of clear communications between a tenant and landlord, especially concerning a matter as important as the exercise of an option to purchase leased property. In 1984, the lessor leased property in Gary, Indiana, to the Calumet Township Trustee for a term of ten years. During the course of that term, the parties leased additional adjacent space. At the end of that term, the lease was renewed and the lessee agreed to build a garage on the space and enlarge a parking lot. That lease amendment also granted to the lessee an option to purchase the property for \$200,000 at the end of the renewed ten-year term provided that the lessee gave the lessor written notice of its exercise of the option during November 2003 and the lessee was not in default under the lease at the time of the exercise of the option.¹⁵³

We are not told about the lessee's payment habits during the course of the lease, except that beginning in January 2002, the lessee never paid its monthly rent installment on the first of the month as the lease required. Instead, the lessor would send to the tenant a bill for the rent and the lessee would pay, on average, eight days late.¹⁵⁴ Apparently, the lessor acquiesced to this payment plan. On November 3, 2003, the lessee having not yet paid rent for the month, sent a letter to the lessor indicating that the lessee “proposes to enter into negotiations leading to the possible purchase of the [leased premises].”¹⁵⁵ The notice referenced the provision of the lease amendment granting the option, but did not mention the \$200,000 price agreed upon in the lease. The lessor, justifiably sensing that the lessee may have been trying to renegotiate the price, responded with a letter challenging the efficacy of the letter as an exercise of the option and requested a second letter clearly exercising the option and referencing the price. On November 24, 2003, the lessee submitted a second notice clarifying the price.¹⁵⁶

However, by this time, the rent for November remained unpaid. The lessor responded to the lessee's November 24 letter with a letter again rejecting the efficacy of the purported exercise of the option, this time on the basis that the lessee was in default because the rent had not been paid when due under the lease. The lease specifically conditioned the lessee's right to exercise the option on there being no uncured default by tenant. The lessor further stated that if the rent for November and December would be paid by December 8, the lessor would be willing to negotiate with the lessee upon the terms of the sale of the leased premises, as the lessor could not “simply restore the lapsed Option to

151. *Id.* at 1075.

152. 852 N.E.2d 971 (Ind. Ct. App. 2006), *trans. denied*, (Ind. Jan. 18, 2007).

153. *Id.* at 973-74.

154. *Id.* at 974.

155. *Id.*

156. *Id.* at 975.

Purchase.”¹⁵⁷ So it seemed that the lessor was changing his tune a bit, no longer content to just get confirmation that the lessee was willing to purchase the property on the terms originally agreed to in the lease. The lessee responded that it remained ready, willing and able to complete the purchase by the date set forth in the lease. When that closing did not occur timely, the lessee brought its declaratory judgment action against the lessor to resolve the dispute.¹⁵⁸

The court of appeals ultimately found for the lessee and held that it had properly exercised the option under the Lease.¹⁵⁹ The court noted that in construing option agreements, “courts have required strict adherence to the option’s terms.”¹⁶⁰ In this case, the exercise of the option required the occurrence or existence of three items: (1) that the lease be in effect as of November 1, 2003; (2) that the lessee “must not [be] in default or in arrears on any payments due under the Agreement;”¹⁶¹ and (3) that the lessee give written notice of exercise of the option during the month of November 2003. Regarding the last event, the court analyzed the two notices that the lessee had given. The first notice given on November 3, 2003, proved to be ineffective to exercise the option because it did not unequivocally state the purchase price, but instead seemed to indicate that the lessee was not necessarily agreeing to the price set forth in the lease.¹⁶² Fortunately for the lessee, its additional correspondence sent on November 24, 2003, cured the deficiency of the initial letter, and the court concluded that this second notice satisfied the notice of exercise component of the terms of the option.¹⁶³

Regarding the first two components, it is clear that on November 1, 2003, the lessee had not paid rent for November and, accordingly, was in default of the lease. The lease contained the following provision under the heading “Remedies of Lessor”:

If said rent, or any part thereof, shall at any time be in arrears and unpaid, and without any demand being made therefore (*sic*), or if said lessee or his assigns shall fail to keep and perform any of the covenants, agreements or conditions of this lease, on his part to be kept and performed, and such default is not cured within thirty (30) days after written notice from Lessor setting forth the nature of such default, . . . it shall be lawful for Lessor, his heirs or assigns without notice or process of law, to enter into said premises, and again have, repossess and enjoy the same as if the lease had not been made¹⁶⁴

One grammatical interpretation of this language would be that no demand need

157. *Id.* at 975-76.

158. *Id.*

159. *Id.* at 984.

160. *Id.* at 981.

161. *Id.* at 982.

162. *Id.*

163. *Id.* at 983.

164. *Id.* at 973.

be made by the lessor regarding the payment of rent and that notice of default is required only for those other (i.e., non-monetary) defaults by the lessee. The court indeed seemed to indicate agreement with that interpretation when it noted that “the Lessors may not have been *required* to provide notice to the [lessee].”¹⁶⁵ Nevertheless, the court found that under the lease and option the lessor “did not consider the [lessee] to be in default under the Agreement as long as the rent was paid within thirty days after the [lessee] was provided with written notice of any arrearage.”¹⁶⁶ Here, the lessor first gave notice of the delinquency on November 28, in which the lessor stated that if the rent of November and December would be paid by December 8, the lessor would consider negotiating a sale of the property to the lessee. The lessee paid the November rent on December 2 (the day after it received the lessor’s letter) and paid the December rent on December 8.¹⁶⁷ Because the rental arrearage was cured within thirty days, all of the conditions to the exercise by the lessee of the option were met, and the lessor was bound to honor the option.¹⁶⁸

D. Tenant’s Guarantor’s Liability

In *HK New Plan Marwood Sunshine Cheyenne, LLC v. Onofrey Food Services*,¹⁶⁹ Onofrey Food Services, as tenant, assumed a retail lease. David Onofrey signed a personal guaranty which contained a clause which provided that the guaranty would terminate on September 25, 2001, “provided that Tenant at no time during the term of this Lease was in default thereunder beyond the applicable cure period, if any, as set out in the Lease.”¹⁷⁰ Tenant made a number of late rent payments prior to September 25, 2001, but Landlord did not send Tenant a default notice. Tenant vacated the premises on May 19, 2004 and Landlord sued Tenant and Onofrey, as guarantor of the Lease.¹⁷¹ Onofrey argued that the guaranty terminated on September 25, 2001. The trial court agreed, and granted summary judgment to Onofrey. The landlord appealed.

The court of appeals found that under the plain language of the lease and guaranty, the guaranty did not terminate on September 25, 2001 because the Tenant had been in default prior to that date. The court noted that landlord did not waive Tenant’s default by accepting late payments because the lease contained a provision that expressly prohibited such waiver.¹⁷² “Further,” the court held, “[the guaranty] was not affected by [Landlord’s] failure to assert its rights against [Tenant].”¹⁷³

165. *Id.* at 984.

166. *Id.*

167. *Id.* at 983.

168. *Id.* at 984.

169. 846 N.E.2d 318 (Ind. Ct. App. 2006).

170. *Id.* at 322.

171. *Id.*

172. *Id.*

173. *Id.* at 325.

E. Residential Tenant Security Deposit

The court of appeals in *Starks v. Village Green Apartments*¹⁷⁴ addressed the often-litigated statutory requirement requiring residential landlords to either return any security deposit made by their tenants or provide notice specifying any damages which are to be offset against such security deposits within forty-five days after the tenant's lease expires or terminate.¹⁷⁵ In this case, the landlord entered into a lease with four individuals, two college students and their fathers. The students lived in the apartment for a short time, but then vacated. Rent was paid for approximately four months of the one-year term.¹⁷⁶ The landlord within a month following the date through which rent had been paid, sent a security deposit notice addressed to one of the four tenants at the apartment address. The landlord then submitted the matter to a collection agency who then issued a demand letter addressed to the students and mailed to the apartment address. Somehow, the tenants learned of the collection activities and sent to it a letter claiming that the apartment had been relet to someone else, and that, therefore, there were no damages. Other than a mere denial of any reletting nothing further happened for approximately four years.¹⁷⁷

Eventually the landlord filed suit against all four tenants for collection of the unpaid rent. The trial court granted the landlord's motion for summary judgment and the tenants appealed.¹⁷⁸ The tenants argued that they were not liable to the landlord because the landlord never sent the tenants the itemized list of damages required under the statute. The landlord dutifully and correctly pointed out that the landlord's obligation to provide the list does not arise until the tenant provides a forwarding address and that because the student/tenants who occupied the apartment did not do so, the landlord was not yet under an obligation to send the list.¹⁷⁹ The father/tenants reminded the landlord that they were tenants too and that the landlord had the fathers addresses from the outset. The trial court agreed with the landlord and found that because the father/tenants were not physically occupying the apartment, they were not the "tenants" as that term is used in the statute, i.e., an individual who occupies a rental unit."¹⁸⁰ The court of appeals, however, disagreed, holding that in one sense to "occupy" means "to take or hold possession or control."¹⁸¹ In this sense, a "tenant" is not only those who physically occupy the leased property, but those who have the right to do so. Accordingly, the landlord had the forwarding addresses of the tenants in the landlord's possession on the date of lease termination and was obligated to send

174. 854 N.E.2d 411 (Ind. Ct. App. 2006).

175. See IND. CODE § 32-31-3-12 (2004).

176. *Starks*, 854 N.E.2d at 413.

177. *Id.* at 412.

178. *Id.* at 413.

179. *Id.* at 416.

180. *Id.* (citing IND. CODE § 32-31-3-10 (2004)).

181. *Id.* (citing *Merriam-Webster's Online Dictionary*, <http://www.m-w.com/dictionary/occupy>).

to them a security deposit notice within forty-five days of that date.

The court then addressed the results of landlord's failure to delivery the list, which was fairly draconian, but certainly in line with prior cases—it "constitutes an agreement by the landlord that no damages are due."¹⁸² Judge Crone filed a dissenting opinion in this case on that issue.¹⁸³ He argued that the statute itself contains a provision that the section obligating landlord to deliver the itemized list of damages "does not preclude the landlord or tenant from recovering other damages to which either is entitled."¹⁸⁴ In Judge Crone's view, unpaid rent in excess of the security deposit falls within the category of "other damages" to which a landlord should still be entitled to recover and to hold otherwise would render the above-quoted provision meaningless.¹⁸⁵ The statute does not, unfortunately, attempt to define "other damages;" however, the statute does list the categories of damages that the landlord must itemize, the first one of which is accrued rent.¹⁸⁶ Since accrued rent is an item of damage specifically mentioned in that section, an interpretation which excludes accrued rent from being deemed "other damages" does not seem to be improper.¹⁸⁷

IV. GOVERNMENTAL AND EMINENT DOMAIN

A. *Pre-judgment Interest*

In *State of Indiana v. Dunn*,¹⁸⁸ on April 24, 2000, the State filed an eminent

182. *Id.* at 417 (quoting *Mileusnich v. Novogroder Co.*, 643 N.E.2d 937, 941 (Ind. Ct. App. 1994)).

183. *Id.* at 418.

184. IND. CODE § 32-31-3-12(c) (2004).

185. *Starks*, 854 N.E.2d at 418.

186. IND. CODE § 32-31-3-12(a)(1).

187. The two cases the dissent cites for the proposition that a landlord remains entitled to "other damages" do not stand for the proposition that "other damages" available to a landlord include accrued rent. The first case, *Miller v. Geels*, 643 N.E.2d 922 (Ind. Ct. App. 1995), addressed a circumstance where the landlord had timely provided the itemized list of damages, but the tenant argued that the list included items not specifically delineated in the statute as categories of damages to be itemized. The court in that case found that the "other damages" provision clarified that the section's itemization of categories was not exhaustive. *Id.* at 927. The second case, *Schoknecht v. Hasemeier*, 735 N.E.2d 299 (Ind. Ct. App. 2000), was an appeal by a landlord of a summary judgment award to a tenant that the landlord's itemization was deficient in that it included deductions for items not specifically delineated in the security deposit statute. The court in that case, along the lines of the *Miller* case, reversed the summary judgment and remanded on the basis that the landlord is not precluded from including damages other than those specifically set forth in the statute in landlord's itemization. *Id.* at 303. Because accrued rent is listed as an itemizable category of damages, it seems clear that it cannot also be "other damages." *Id.* The result is harsh and perhaps, as the dissent states, "manifestly unreasonable"; however, this seems to be the result intended by the statute. *Id.*

188. 837 N.E.2d 206 (Ind. Ct. App. 2005).

domain action to acquire a portion of the Dunns' real estate. On October 2, 2002, the trial court ordered the appropriation of the real estate and commenced the valuation process. On November 13, 2002, the appraisers filed their report, appraising the property at \$68,000.¹⁸⁹ On February 7, 2003, the State paid the appraised amount to the trial court. On April 4, 2003, the clerk disbursed the appraised amount to the Dunns. Following a jury trial in July 2004, the jury returned a verdict in favor of the Dunns for \$302,895. The trial court ordered the State to pay the statutory eight percent interest rate from the date of the filing of the complaint, April 24, 2000, for a total of \$71,890 in prejudgment interest. The State filed a Motion to Correct Errors, arguing that the trial court incorrectly calculated the prejudgment interest.¹⁹⁰

The court of appeals agreed with the State, noting that Indiana Code section 32-24-1-11 provides that prejudgment interest shall be computed from the date the condemning party takes possession of the real estate. In this case, the State did not take possession until February 7, 2003, the day it paid the appraised amount to the trial court.¹⁹¹

B. Sewer Service Rates

In *Bass Lake Conservancy District v. Brewer*,¹⁹² the Bass Lake Conservancy District defined a residence with two separate living areas as a "multiplex" and assessed a higher rate for sewer services. The Brewer's home has a separate kitchen and laundry facilities on the main floor for the use of elderly family members who have difficulty with the stairs. Although the Brewer's home was not divided into separate units and was occupied by a single extended family, the Board found that it is a multiplex.¹⁹³ The Indiana Court of Appeals held that the application of this definition to the Brewer's home was "arbitrary, capricious, and contrary to law."¹⁹⁴ The Indiana Supreme Court reversed and found that the classification was within the Board's discretionary authority.

C. Determination of Condemnation Award

In *Southtown Properties, Inc. v. City of Fort Wayne*,¹⁹⁵ the City of Fort Wayne offered a package of financial incentives for the redevelopment of the failing Southtown Mall. After a string of private contracts to acquire the mall from its group of owners failed to result in a sale, the City commenced condemnation proceedings. The court-appointed appraisers found the value of the mall to be \$3.44 million. At the trial to determine damages, the Owners testified that the value of the mall was between \$8 million and \$9 million and

189. *Id.* at 207.

190. *Id.*

191. *Id.*

192. 839 N.E.2d 699 (Ind. 2005).

193. *Id.* at 701.

194. *Id.* at 702.

195. 840 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1010 (Ind. 2006).

argued that the value of the City's incentives should be considered when valuing the mall.¹⁹⁶ The jury determined just compensation to be \$4.5 million. The Owners appealed on two issues: (1) that the trial court erred by excluding evidence related to the value of the City's incentives; and (2) that the Owners should not have been required to pay 2004 property taxes because the City took title on the date of the filing of the condemnation action, October 30, 2003, which was before the assessment date for 2004 taxes, March 1, 2004.

The court noted that "it is well established in Indiana that the basic measure of damages in eminent domain cases is the fair market value of the property at the time of the take."¹⁹⁷ However, the court cautioned, "[n]ot *all* facts . . . are relevant to the fair market value of the property."¹⁹⁸ The court referred to a 1969 case in which the Indiana Supreme Court affirmed the trial court's exclusion of evidence that the value of the condemned property was impaired by the proposed highway project for which the property was being taken.¹⁹⁹ *Sovich* held:

It is difficult to imagine a more specious argument. If [the State's] argument were adopted by this court it would be a simple matter for any condemnor to depress property values merely by publishing details of the planned project [I]t is clear that the weight of authority holds that neither an increase nor a decrease in the market value of the property sought to be taken, which is brought about by the same project for which the property is being taken, may be considered in determining the value of the property.²⁰⁰

The *Southtown* court did not deny that the value of the incentives increased the potential sale value of the mall, however, "any increase in the potential *sale* value of the Property brought about by the incentives is irrelevant to the determination of the *condemnation* value of the Property."²⁰¹ The court reasoned that the incentives are not being "taken" from the Owners, although if the Owners had been successful in selling the property prior to condemnation, they would have profited from those incentives. The court's holding is firmly based in public policy. By not including the value of public development incentives in the condemnation award, the property owner will be prevented from receiving a windfall. Including them would discourage municipalities from crafting revitalization plans with financial incentives because, in the event of condemnation, they would pay for them twice.

On the second issue, the City filed its condemnation action on October 30, 2003 and tendered the appraised condemnation value of the property to the court on March 5, 2004. The court, relying on Illinois cases, held that the City took title to the mall on October 30, 2003 and that the Owners were therefore not

196. *Id.* at 398.

197. *Id.* at 400 (quoting *State v. Bishop*, 800 N.E.2d 918, 923 (Ind. 2003)).

198. *Id.*

199. *State v. Sovich*, 252 N.E.2d 582 (Ind. 1969).

200. *Id.* at 588.

201. *Southtown Props.*, 840 N.E.2d at 401 (emphasis in original).

liable for 2004 taxes, which were assessed March 1, 2004. “In short, after a property owner’s land is condemned, he holds something less than legal title in fee to the property.”²⁰²

D. Residential Unit Registration

In *City of Vincennes v. Emmons*,²⁰³ the Vincennes housing code (“Code”) was at issue. The Code sets standards for residential rental units and contains enforcement mechanisms that include inspection. The Code also requires landlord to pay an annual registration fee of \$18 per unit. Three landlords, Emmons, Hendrixson, and Klein (collectively, “Landlords”) failed to pay the registration fee for several years. The City brought an enforcement action and the Landlords claimed that the Code was unconstitutional because its provision for the inspection of rental units violated the Fourth Amendment to the Constitution.²⁰⁴ The trial court agreed and found in favor of the Landlords. The City appealed and the court of appeals affirmed the trial court. The Indiana Supreme Court granted transfer and reversed, holding that the Code’s lack of a warrant procedure did not violate the Fourth Amendment.

The Code calls for an initial inspection of a rental unit when it is put on the market and mandatory inspections every two years.²⁰⁵ In addition, the Code permits inspections at the discretion of the Rental Housing Officer. Before an inspection is conducted, the Code provides for notice to be given to both the landlord and the tenant. If the tenant objects, the Code provides that the City may not inspect without a search warrant. The Code does not require landlord consent and if a tenant consents but the landlord objects, no warrant is required. The Landlords argued, and the court of appeals agreed, that the Fourth Amendment requires that a search warrant must be obtained if landlords refuse consent.²⁰⁶

Justice Boehm, writing for the court, noted that “[l]andlords do not themselves occupy the rental units as either personal residences or as commercial space. Their interests are therefore substantially further down the scale of protected interests than either the residential or commercial tenant, and in most circumstances fall off the scale altogether.”²⁰⁷ The Landlords argue that they have a “security interest” which may be compromised by a warrantless search because such a search could uncover a Code violation which would subject them to civil fines.²⁰⁸ However, Justice Boehm reasoned, “[t]he discovery of a Code violation during the course of a housing code inspection compromises no

202. *Id.* at 409-10.

203. 841 N.E.2d 155 (Ind. 2006).

204. *Id.* at 157.

205. *Id.*

206. *Id.* at 158.

207. *Id.* at 161.

208. *Id.*

legitimate privacy interest.”²⁰⁹

E. Inverse Condemnation

In *Beck v. City of Evansville*,²¹⁰ homeowners in Evansville suffered property damage following significant flooding in 2003 and 2004. Several homeowners sued the City for negligence, nuisance, and inverse condemnation. The trial court found that the City is immune from liability on the negligence and nuisance claims and determined that there was no taking. The homeowners appealed. The court of appeals affirmed the trial court.

The homeowners argued that the storm sewer system is inadequate during times of heavy rainfall, that the flooding deprives them of enjoyment of their property, and that such deprivation constitutes inverse condemnation.²¹¹ The court cited a 1985 case for the proposition that:

Some physical part of the real estate must be taken from the owner or lessor, or some substantial right attached to the use of the real estate taken before any basis for compensable damage may be obtained by an owner of real estate in an eminent domain proceeding. It must be special and peculiar to the real estate and not some general inconvenience suffered alike by the public.²¹²

Since the homeowners suffered only temporary interference with their homes, the court found that their “free use, enjoyment, and interest in their properties have not been impaired.” Therefore, no taking occurred.

V. TAX SALES

A. Notice of Redemption

In *Hall v. Terry*,²¹³ the court of appeals considered whether the notice of redemption contemplated by Indiana Code section 6-1.1-25-4.5(f) requires the notice to include an itemization of the components of the amount required to redeem the real property.²¹⁴

Prior to 2001, the statute required that the notice contain “the amount of the judgment for taxes, special assessments, penalties, and costs under Indiana Code §6-1.1-24-4.7, to redeem the real estate.”²¹⁵ The change in 2001 is clear from the amending statute: “The *components of the amount* of the judgment for taxes; special assessments; penalties; and costs under IC 6-1.1-24-4.7 required to

209. *Id.*

210. 842 N.E.2d 856 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

211. *Id.* at 864.

212. *Id.* at 863 (quoting *Taylor-Chalmers, Inc. v. Bd. of Comm’rs*, 474 N.E.2d 531, 532 (Ind. Ct. App. 1985)).

213. 837 N.E.2d 1095 (Ind. Ct. App. 2005).

214. IND. CODE § 6-1.1-25-4.5(f) (2006).

215. *Hall*, 837 N.E.2d at 1098 (quoting former version of IND. CODE § 6-1.1-24-4.7).

redeem the . . . real property.”²¹⁶

In this case, the notice from Terry stated that the “components of the amount required to redeem the property include interest, taxes, special assessments, penalties and costs as set forth in Indiana Code §6-1.1-25-2,”²¹⁷ but it did not itemize those components. The court of appeals held that this language was sufficient.

B. Notice of Tax Sale

In *Diversified Investments, LLC v. U.S. Bank, NA*,²¹⁸ the Auditor sent notices of a tax sale to a mortgagee at its address of record. Those notices were sent via certified mail, return receipt requested. Both receipts were signed and returned; however, the first receipt had the address stricken and another address handwritten on the card. The tax deed was issued and the mortgagee was successful on a motion to have the tax deed voided due to insufficient notice.

The court of appeals then addressed the question of

whether the alternative address written on a return receipt postcard by an unknown party is sufficient to supply inquiry notice of a change of address to the Auditor, or whether a party with a substantial interest in property has an obligation to update the Auditor’s official record of address.²¹⁹

The court concluded that the handwritten address did not trigger inquiry notice on the part of the Auditor.²²⁰ The court distinguished similar cases, noting that in this case neither notice was returned and that the Auditor went beyond the notice requirements by requesting return receipt. In addition, the court noted that the mortgagee had twelve years to update its address in the Auditor’s records and failed to do so.²²¹

VI. MORTGAGES

A. Open-Ended Mortgages

The court of appeals addressed the enforceability of a so-called dragnet clause in a mortgage in *Hepburn v. Tri-County Bank*.²²² In this case, Lois and William Hepburn were a married couple. Lois owned some farmland solely in her name. William owned a window business. In 1998, Lois borrowed \$40,000 from Tri-County Bank (the “Bank”) and secured the loan with a mortgage on her

216. *Id.* (quoting P.L. 139-2001 § 16).

217. *Id.* at 1097.

218. 838 N.E.2d 536 (Ind. Ct. App. 2005), *trans. denied*, 860 N.E.2d 584 (Ind. 2006).

219. *Id.* at 539.

220. *Id.* at 544.

221. *Id.*

222. 842 N.E.2d 378 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 592 (Ind. 2006).

land.²²³ The mortgage contained a provision securing future obligations and advances. In 1999, Lois and William borrowed \$116,750 from the Bank under a new note, secured by a second mortgage on the same farmland, with the same future obligations and advances provision.²²⁴ In 2002, William borrowed \$80,000 under a new note secured by, among other things, a third mortgage executed by Lois, which contained the same future obligations and advances provision, and a personal guaranty by Lois. The guaranty covered

each and every debt, of every type and description, that the borrower may now or at any time in the future owe, up to the principal amount of \$400,000 You may, without notice, apply this guaranty to such debts of the borrower as you may select from time to time.²²⁵

The guaranty had a checkbox for the Bank to mark “secured” or “unsecured.” The bank marked the box for “unsecured.” In 2003, William borrowed an additional \$12,000 and \$168,061 under two new notes, both of which referenced the 2002 security instruments.

In 2004, the Bank filed a complaint against Lois and William, alleging that William had defaulted on his notes and requesting foreclosure on the mortgages. The Hepburns disputed the amount of the debt and “demand[ed] the guaranty was secured by existing mortgages.”²²⁶ The Bank were granted summary judgment. The Hepburns appealed.

The Hepburns do not dispute that the Bank properly foreclosed on the three mortgages. Instead, they argue that the Bank should not have used the foreclosure to collect the amounts due on the other two loans to William that did not reference the mortgages. The Bank claims that Lois’s three mortgages attached to all five of the notes because Lois executed the guaranty and the three mortgages contained future obligations and advances provisions.

The court of appeals affirmed that “dragnet” clauses, which essentially create an “open-ended mortgage” are valid in Indiana.²²⁷ The provisions in Lois’s mortgages “could not have been written more broadly, as it encompasses *any* future obligation Lois may have to the Bank.”²²⁸ Judge Robb, in dissent, agreed with Lois that the Bank “waived the opportunity to assert the mortgages secured the guaranty because the Bank marked the guaranty ‘unsecured.’”²²⁹

In a second case involving the enforceability of mortgage dragnet clauses, the supreme court in *The Money Store Investment Corp. v. Summers*²³⁰ declined to enforce an attempt by a purchaser of a mortgage containing a dragnet clause to

223. *Id.* at 381.

224. *Id.*

225. *Id.* at 381-82.

226. *Id.* at 382.

227. *Id.* at 385 (quoting *Citizens Bank & Trust Co. of Washington v. Gibson*, 490 N.E.2d 728, 730 (Ind. 1986)).

228. *Id.* (emphasis in original).

229. *Id.* at 386 (Robb, J., dissenting).

230. 849 N.E.2d 544 (Ind. 2006).

enhance its priority over prior, junior debt of the mortgagor.²³¹ In this case, from 1992 to 1996, Summers granted eleven mortgages on three parcels of land to Fort Wayne National Bank (the “Bank”), three of which contained dragnet clauses.²³² In 2000, Summers and an entity he controlled, Mangy Moose, arranged a payoff of the Bank loans, to be replaced by new debt from Money Store secured by a mortgage on the three parcels.²³³ Prior to the closing of the new loans, Summers received payoff statements from the Bank.²³⁴ At the closing, the Bank received \$375 less than indicated on the payoff statements and did not release the mortgages.²³⁵ The Bank was also owed \$4700 from Mangy Moose’s overdrawn checking account.²³⁶

In 2001, Money Store filed a complaint for foreclosure and appointment of a receiver. In 2002, a judgment was entered against Summers and Mangy Moose in an unrelated case and the plaintiff, Phillips, was awarded \$205,700.²³⁷ Phillips then purchased the Bank’s unreleased mortgages and moved to intervene in the Money Store foreclosure. Phillips and Money Store moved for summary judgment.²³⁸ The trial court ordered foreclosure on both Phillips’s and the Money Store’s mortgages. It “held that the ‘dragnet’ clauses in three of the mortgages assigned to Phillips secured ‘all debts or obligations owed to Paula Phillips by Summers, which included Phillips judgment lien against Summers.’”²³⁹ The trial court granted priority to the Phillips mortgages over the Money Store mortgages. The court of appeals affirmed.²⁴⁰ The Indiana Supreme Court granted transfer and reversed.²⁴¹

Chief Justice Shepard, writing for the court, noted that it was an issue of first impression in Indiana whether a junior creditor could take “an assignment of the first mortgage holder’s ‘dragnet’ mortgages, seeking to ‘tack on’ her judgment lien and ‘leapfrog’ the second mortgage holder.”²⁴² The Chief Justice concluded that “this was a nice try, but the original parties to the dragnet mortgages did not intend to secure a subsequent debt owed by the mortgagor to a third party.”²⁴³

Money Store argued that the Bank would have been equitably estopped from asserting the priority of its mortgages because Money Store was “induced” to make the loans to Summers and Mangy Moose in the belief that the Bank’s

231. *Id.* at 546.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 546-47.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 546.

243. *Id.*

mortgages would be released.²⁴⁴ The court disagreed with this reasoning, noting that Money Store had the means of knowing whether or not the prior mortgages had been released. “A simple title search and/or communications with [the Bank] would have revealed that the mortgage had not been released.”²⁴⁵

The court noted that although dragnet clauses are valid in Indiana, they are strictly construed.²⁴⁶ The main consideration is the parties’ intentions. The court cited an 1888 case for the proposition that:

The mortgage language need not literally describe the debt, but ‘the character of the debt and the extent of the encumbrance should be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of fraud upon creditors.’²⁴⁷

In the court’s view, it was not the intention of the Bank and Summers that the dragnet clause could be used to incorporate Phillips’s judgment lien.²⁴⁸ “Applying Phillips’ rationale, the mortgages secured any debt owed by Summers to any creditor crafty enough to obtain an assignment of the mortgages. This simply cannot be.”²⁴⁹ Instead, Phillips was only entitled to collect the debts that she was assigned, namely, the \$375 payoff shortfall, the \$4700 checking account overdraft, plus interest, collection costs, and attorney’s fees.²⁵⁰

B. Receiver

In *The Eryk-Midamco Co. v. Bank One*,²⁵¹ Bank One loaned money to a company that owned The 225 Building, the mortgage of which secured the loan. Eryk-Midamco (“Eryk”) purchased the building and assumed the loan and mortgage.²⁵² After a few years, Eryk stopped paying its monthly payments and Bank One filed a complaint against Eryk and two guarantors to foreclose. Eryk and Bank One appointed a receiver. At the meeting to negotiate the Agreed Order Appointing Receiver and while Bank One’s representatives were out of the room, the president of the property manager ordered the controller of the property manager to transfer \$376,000 from Eryk’s bank account to the property manager’s bank account.²⁵³ When Bank One learned of the transfer, it “demanded that the transferred funds be turned over to Bank One or the

244. *Id.* at 547.

245. *Id.* at 547-48.

246. *Id.* at 548.

247. *Id.* (quoting *New v. Sailors*, 16 N.E. 609, 610 (Ind. 1888)).

248. *Id.*

249. *Id.*

250. *Id.*

251. 841 N.E.2d 1190 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1012 (Ind. 2006).

252. *Id.* at 1192.

253. *Id.* at 1192-93.

receiver.”²⁵⁴ Subsequent to Bank One’s demand, the receiver issued its final report and request for discharge, which did not mention the disputed funds. Bank One did not object to the final report. A few months later, Bank One filed a complaint against Eryk and the property manager alleging conversion, among other similar charges.²⁵⁵ The trial court found in favor of Bank One with respect to the conversion charge.²⁵⁶ Eryk and the property manager appealed.²⁵⁷

The court of appeals noted that Indiana Code section 32-30-5-18 provides that a creditor or other interested party may file objections to the receiver’s report within thirty days and that:

any objections or exceptions to the matters and things contained in an account or report and to the receiver’s acts reported in the report or account that are not filed within the thirty (30) day period referred to in section 17 of this chapter are forever barred for all purposes.²⁵⁸

The court found this language to be dispositive stating that “[h]aving failed to object . . . [Bank One] is ‘forever barred’ from raising these claims against the Appellants.”²⁵⁹

VII. DEVELOPMENTS IN THE COMMON LAW OF PROPERTY

A. *Prescriptive Easements*

In *Wilfong v. Cessna Corp.*,²⁶⁰ Wilfong’s predecessors-in-title used a private roadway across Cessna Corp.’s property from approximately 1932 through 1998.²⁶¹ When Wilfong purchased the property in 1998, Cessna Corp. locked a gate and effectively denied Wilfong access to the roadway. In response, Wilfong filed a lawsuit claiming that he held a prescriptive easement based on his predecessors-in-title’s use of the roadway.²⁶² After a bench trial, the trial court held that Wilfong did not have a prescriptive easement because the prior use was not hostile, but “by permission” of Cessna.²⁶³ Wilfong appealed. The court of appeals reversed the trial court, finding that Wilfong held a prescriptive easement “[b]ased [in part] on the overwhelming evidence . . . that no permission has ever been given to use the Roadway linking the Wilfong estate to the public road.”²⁶⁴

254. *Id.* at 1193.

255. *Id.*

256. *Id.* at 1193-94.

257. *Id.* at 1194.

258. *Id.* (quoting IND. CODE § 32-30-5-18(b) (2004)).

259. *Id.* at 1195.

260. 838 N.E.2d 403 (Ind. 2005).

261. *Id.* at 405.

262. *Id.*

263. *Id.*

264. *Id.* (quoting *Wilfong v. Cessna Corp.*, 812 N.E.2d 862, 867 (Ind. Ct. App. 2004)).

The Indiana Supreme Court granted transfer.²⁶⁵

The court noted that the reformulated test in *Fraley v. Minger*²⁶⁶ applies to prescriptive easements as well, “save for those differences required by the differences between fee interests and easements.”²⁶⁷ The four required elements are: control, intent, notice, and duration. In this case, the court criticized the court of appeals for apparently reweighing the evidence presented to the trial court, particularly the testimony of witnesses for both Cessna and Wilfong with respect to whether express permission was ever granted to Wilfong’s predecessors-in-title to use the roadway.²⁶⁸

Regardless of whether express permission was given, however, the court stated that “the trial court’s ruling can be sustained under a theory of implied permission grounded in the cordial relationship between the Cessna and Inman families.”²⁶⁹ The testimony indicated a “very cordial” relationship between Leroy Inman, who owned the Wilfong parcel from 1944 to 1998, and the Cessna family, which acquired the parcel in 1953.²⁷⁰ The court held that “this evidence is sufficient to infer permissive use.”²⁷¹

Interestingly, the court did not address whether a prescriptive easement could have been established prior to the Cessna family’s acquisition of their parcel in 1953. The facts indicate that the roadway had been used by Inman’s predecessor since at least 1932.²⁷² If that use otherwise met the test, the cordial relationship between Inman and Cessna could not have defeated the prescriptive easement.

The court of appeals in *Chickamauga Properties, Inc. v. Barnard*²⁷³ addressed the requirements to establish the creation of prescriptive easements in light of last year’s Indiana Supreme Court decision restating the common law rules for establishing rights created by adverse possession set forth in *Fraley v. Minger*²⁷⁴ and discussed the common law rules for determining whether an easement has been abandoned.²⁷⁵ In *Chickamauga*, the court was confronted with a situation where Chickamauga owned property fronting Airport Road.²⁷⁶ The Barnards in 2001 acquired via a tax sale property behind the Chickamauga’s property and in 2003 acquired a lot just south of that property. Neither of such lots had any direct access to Airport Road.²⁷⁷ The second acquired lot was purportedly conveyed with an easement for access to and from Airport Road,

265. *Id.*

266. 829 N.E.2d 476 (Ind. 2005).

267. *Wilfong*, 838 N.E.2d at 406.

268. *Id.* at 406-07.

269. *Id.* at 407.

270. *Id.*

271. *Id.*

272. *Id.* at 404.

273. 853 N.E.2d 148 (Ind. Ct. App. 2006).

274. 829 N.E.2d 476 (Ind. 2005).

275. *Chickamauga Props., Inc.*, 853 N.E.2d at 152-54.

276. *Id.* at 150-51.

277. *Id.* at 151.

which is the same easement language that the prior owner had received in 1994 when they acquired the property.²⁷⁸ The roadway was actually on the Chickamauga's property which was apparently never owned by the party who initially granted the easement, Mr. Dixon.²⁷⁹ In the spring of 2003 the Barnards began building a home on their property and in the summer Chickamauga blocked the access road. The Barnards contacted the police and a lawyer for advice and then removed the stakes blocking the access road and finished the home in which they began living in December 2003. The following month, Chickamauga began building a fence blocking the access road which prompted the Barnards to seek an injunction against Chickamauga's blocking of the access road.²⁸⁰

Evidence at the trial indicated quite clearly that in 1970s the prior owner of the Barnard's property, Mr. Dixon moved a double-wide mobile home onto the property and lived there until 1994, when he conveyed the property to the Barnard's predecessor. The access road was the principal means of access to the home and was used by Mr. Dixon as well as visitors to the home.²⁸¹ The *Fraley* factors of control, intent, notice and duration were plainly met by Mr. Dixon's use.

Chickamauga then argued that the easement rights were abandoned through non-use. It appears that the Barnards direct predecessor used the property for a kennel operation and, after being requested by Chickamauga to move some encroaching kennels off of Chickamauga's property and to stop using the access road, the kennel operator principally used another means to access the property through another parcel owned by the kennel operator. No one then used the portion of the access road located on the Chickamauga's property from 2000 through 2002 when the Barnards started building their home.²⁸² The court noted that easements, whether created expressly or prescriptively, may be abandoned by the discontinuance of the use of the easement coupled with "an intention to abandon and put an end to [the easement]."²⁸³ In this case, intent to abandon the easement was not shown. There was intermittent use by the kennel operator after the confrontation with Chickamauga of at least that portion of the access road which was on the kennel operator's property and the conveyance of the property to the Barnards specifically included the easement. Furthermore, a prescriptive easement, being established by use in excess of twenty years, "may be deemed abandoned after 'nonuser for a like period.'"²⁸⁴ Accordingly, even if there was an intent to abandon the prescriptive easement, discontinuance of the use of the access road for just a few years is insufficient to result in the abandonment of the prescriptive easement.

278. *Id.*

279. *Id.* at 150-51.

280. *Id.* at 151.

281. *Id.* at 151, 153.

282. *Id.* at 154.

283. *Id.* (quoting *Seymour Water Co. v. Leblin*, 144 N.E. 30, 33 (Ind. 1924)).

284. *Id.* (quoting *Seymour*, 144 N.E. at 33) (emphasis omitted).

B. Easement by Implication

In *Hysell v. Kimmel*,²⁸⁵ the court of appeals reaffirmed that the courts will only find that an easement has been created by implication if the moving party meets the strict test laid out in the common law:

(1) there was common ownership at the time the estate was severed; (2) the common owner's use of part of his land to benefit another part was apparent and continuous; (3) the land was transferred; and (4) at severance it was necessary to continue the preexisting use for the benefit of the dominant estate.²⁸⁶

C. Adverse Possession

At issue in *Dewart v. Haab*²⁸⁷ was a 5.64 acre parcel of land for which no deed has served as the root of title in excess of 124 years. Dewart claimed to be record title holder of the tract based on an affidavit duly recorded in 1961. Marian and Harold Dewart recorded the affidavit, which attested to their ownership of the tract, for the purpose of placing the Dewarts in the county tax records. Upon Harold's death, the tract passed to Marian and she later executed a quitclaim deed in favor of herself and her two daughters. Two neighbors, Haab and Hapner, believed themselves to be the owners of the disputed parcel. The Dewarts filed complaints alleging trespass and seeking eviction. Haab and Hapner filed a counterclaim seeking to quiet title by adverse possession in their respective portions of the tract. The trial court entered judgment in favor of Haab and Hapner. The Dewarts appealed.

"In the wake of *Fraley*, the Dewarts now maintain that the tax records unambiguously show that they were the exclusive taxpayers on the Tract. Accordingly, the Dewarts assert that Haab's and Hapner's adverse possession claim necessarily fails on this essential element."²⁸⁸ The court noted that both Haab and Hapner "reasonably believed" that the land on which they paid taxes included their respective claimed portions of the Tract, but that this belief was not enough. "Kosciusko County's records for the Tract clearly denote the set 5.64 acres, as bounded by Haab's, Hapner's, and the Dewart's real property, with the Dewarts' name and address as the owners for the purpose of tax payment."²⁸⁹ In light of these facts, the court ruled that a reasonable trier of fact could not concluded that Haab and Hapner complied with the adverse possession tax statute. The court reversed and remanded with instruction to enter judgment in favor of the Dewarts.²⁹⁰

285. 834 N.E.2d 1111 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1006 (Ind. 2006).

286. *Id.* at 1114-15.

287. 849 N.E.2d 693 (Ind. Ct. App. 2006).

288. *Id.* at 696.

289. *Id.* at 697.

290. *Id.*

D. Boundary Descriptions

*Harlan Bakeries, Inc. v. Muncy*²⁹¹ contains, in dicta, a potentially useful reiteration of Indiana common law regarding the role of boundary descriptions and surveys:

It is a familiar rule that it is not the office of a description to identify lands, but simply to furnish the means of identification. Parol evidence is therefore often necessary to make descriptions intelligible. Moreover, we note that with respect to land descriptions, this court has held that the order of preference for the location of boundaries is in descending order as follows: natural objects or landmarks, artificial monuments, adjacent boundaries, courses and distances, and lastly quantity.²⁹²

E. Express Easement

In *Kopestsky v. Crews*,²⁹³ the court of appeals held that where an instrument creating an express easement fails to identify the dominant tenement, an easement can still be created if “the physical situation of two parcels leads to only one reasonable conclusion as to the identity of the dominant tenement[.]”²⁹⁴ The court reasoned that “if we can identify the dominant tenement with reasonable certainty based upon the language of the deed, we are not required to find a direct description of the tenement in the conveyance.”²⁹⁵ Where multiple parcels might fit the description in the instrument, an easement may not be created. However, if there is

(1) an easement across a parcel deeded by the grantor, (2) leading directly to a landlocked parcel retained by the grantor, and (3) extending across no other parcel of land, the description contained in this deed, though not artfully drafted, provides a means of identifying the dominant tenement benefited by the easement created.²⁹⁶

F. Implied Warranties

In a case of first impression in Indiana, the court of appeals in *Williams v. Younginer*²⁹⁷ held that the implied warranties of habitability and workmanship

291. 835 N.E.2d 1018 (Ind. Ct. App. 2005).

292. *Id.* at 1031 (quotations and citations omitted).

293. 838 N.E.2d 1118 (Ind. Ct. App. 2005).

294. *Id.* at 1125.

295. *Id.* at 1126 (emphasis omitted).

296. *Id.* at 1126-27 (citations and emphasis omitted).

297. 851 N.E.2d 351 (Ind. Ct. App. 2006).

are not subject to the doctrine of merger by deed.²⁹⁸ In this case, the Younginers purchased an existing home from Williams, who operated a home construction business under the trade name Prestige Home. The purchase agreement was signed by Williams in his individual capacity rather than as an officer of Williams's corporation.²⁹⁹ The Younginers closed on the purchase of the home in February 2001, and in April 2001, they noticed water leaking in the basement. The Younginers contacted Williams who sent his father to inspect the home. Mr. Williams told the Younginers that the problem appeared to be due to over-watering the lawn, so the Younginers stopped watering the lawn. In fact, that was not the problem and the leaks continued. After over a year of consulting various professionals, the Younginers' water problems persisted and the Younginers filed suit.³⁰⁰

There was apparently no dispute on appeal that the implied warranties of habitability and workmanship were applicable in this case against Williams and that they were breached. Williams's only argument concerning these warranties was that they simply did not apply after the conveyance of the property due to the doctrine of merger by deed. This doctrine essentially provides that all prior or contemporaneous negotiations or executory agreements, written or oral, leading up to the execution of a deed are merged therein by the grantee's acceptance of the conveyance in performance thereof.³⁰¹ There is a general exception to this rule for any collateral or independent rights created under prior contracts or agreements which do not have to do with the "title, possession, quality, or emblements of the land conveyed."³⁰² The court relied on cases from Illinois, North Carolina and South Dakota in finding that public policy dictates that the implied warranties of habitability and workmanship, although they concern the quality of the real estate, should survive the conveyance and not be merged by the deed.³⁰³

298. *Id.* at 357.

299. *Id.* at 354. Mr. Williams admitted at trial that this was an oversight on his part and that he meant to sign the contract as the President of the corporation. It proved to be a costly oversight.

300. *Id.*

301. *Id.* at 356 (quoting *Thompson v. Reising*, 51 N.E.2d 488, 491 (Ind. Ct. App. 1943)).

302. *Id.* at 357 (quoting *Link v. Breen*, 649 N.E.2d 126, 128 (Ind. Ct. App. 1995)).

303. *Id.* at 358.

RECENT DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION—SOME ABBREVIATION REFERENCES

This Article highlights the major tax developments which occurred throughout the calendar year of 2006.¹ Whenever the term “GA” is used in this Article, such term shall refer only to the 114th Indiana General Assembly. Whenever the term “Governor” is used in this Article, such term shall refer only to the Governor of Indiana who was serving in office during the 114th Indiana General Assembly. Whenever the term “Supreme Court” is used in this Article, such term shall refer only to the Indiana Supreme Court. Whenever the term Court of Appeals is used in this Article, such term shall refer only to the Indiana Court of Appeals. Whenever the term “Tax Court” is referred to in this Article, such term shall refer only to the Indiana Tax Court. Whenever the term “DLGF” is used in this Article, such term shall refer only to the Indiana Department of Local Government Finance. Whenever the term “BTR” is used in this Article, such term shall refer only to the Indiana Board of Tax Review. Whenever the term “SBTC” is used in this Article, such term shall refer only to the Indiana State Board of Tax Commissioners. Whenever the term “DOR” is used in this Article, such term shall refer only to the Indiana Department of State Revenue. Whenever the term “I.C.” is used in the text of this Article, such term shall refer only to the Indiana Code which is in effect at time of the publication of this Article. Whenever the term “ERA” is used in this Article, such term shall refer only to an Indiana Economic Revitalization Area. Whenever the term “PTRC” is used in this Article, such term shall refer only to the Indiana Property Tax Replacement Credits. Whenever the term “CAGIT” is used in this Article, such term shall refer only to the Indiana County Adjusted Gross Income Tax. Whenever the term “COIT” is used in this Article, such term shall refer only to the Indiana County Option Income Tax. Whenever the term “EDC” is used in this Article, such term shall refer only to the Indiana Economic Development Corporation. Wherever the term “CDC” is used in this Article, such term shall refer only to the Indiana Community Development Corporation. Whenever the

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1. For comprehensive information concerning the Indiana Tax Court, the Indiana Department of State Revenue, the Indiana State Board of Tax Commissioners, the Indiana Department of Local Government Finance, and a variety of other tax-related information, visit Professor Jegén’s Taxsite at <http://www.iupui.edu/taxsite/> and the Access Indiana website at <http://www.accessindiana.org>.

term “RVCF” is used in this Article, such term shall refer only to an Indiana Regional Venture Capital Fund. Whenever the term “EDA” is used in this Article, such term shall refer only to an Indiana Economic Development Area. Whenever the term “CEDIT” is used in this Article, such term shall refer only to the Indiana County Economic Development Income Taxes. Whenever the term “EDIT” is used in this Article, such term shall refer only to the Indiana Economic Development Income Tax. Whenever the term “EDGE” is used in this Article, such term shall refer only to the Indiana Economic Development for a Growing Economy. Whenever the term “NIRDA” is used in this Article, such term shall refer only to the Northwest Indiana Regional Development Authority. Whenever the term “PTRF” is used in this Article, such term shall refer only to the Indiana Property Tax Reassessment Fund. Whenever the term “CIB” is used in this Article, such term shall refer only to the Indiana Capital Improvement Board.” Whenever the term “MOD” is used in this Article, such term shall refer only to a maritime opportunity district. Whenever the term “MDC” is used in this Article, such term shall refer only to a Indiana Metropolitan Development Commission.” Whenever the term “QIP” is used in this Article, such term shall refer only to Indiana Qualifying Industrial Property. Whenever the term “MBRAB” is used in this Article, such term shall refer only to the Indiana Military Base Reuse Authority Board. Whenever the term “BMV” is used in this Article, such term shall refer only to the Indiana Bureau of Motor Vehicles. Whenever the term “IRC” is used in this Article, such term shall refer only to the Internal Revenue Code which is in effect at the time of the publication of this Article. Whenever the term “AOPA” is used in this Article, such term shall refer only to the Indiana Administrative Orders and Procedures Act.

I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 114th GA passed several pieces of legislation affecting various areas of state and local taxation, i.e., property taxes, local taxes, inheritance tax, and sales and use taxes. There are also several other changes noted in the miscellaneous section. The most significant changes were in the area of property taxes.

Almost all cases which involve Indiana taxation are initially heard by the Tax Court. However, with respect to some cases, the Tax Court hears the case *de novo*, in which case the Tax Court hears the facts, and based on those facts, determines which law should be applied to such facts and what the result should be after making such application. With respect to other cases, the Tax Court sits as an appellate court and determines whether or not the prior trier of facts decision was supported by substantial evidence and whether or not the prior trier of facts properly applied the applicable law to such facts. In this latter case, the Tax Court must determine whether or not the decision of the prior trier of fact was supported by substantial evidence and whether or not such prior trier of fact’s decision was arbitrary, capricious, and an abuse of the prior trier of fact’s discretion. In general, the cases which are heard *de novo* by the Tax Court are those which originate in the DOR and the cases with respect to which the Tax Court sits as an appellate court are those which have been previously tried before the BTR. To emphasize this distinction, the DLGF inserts the following warning

at the end of most of its findings and final determinations:

**IMPORTANT NOTICE
- APPEAL RIGHTS -**

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code §§ 4-21.5-5-7(b)(4), 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Trial Rules are available on the Internet at http://www.in.gov/judiciary/rules/trial_proc/index.html. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>.²

The Tax Court is a court of limited jurisdiction.³ Specifically, the Tax Court has exclusive jurisdiction over any case that arises under the tax laws of Indiana and that is an initial appeal of a final determination made by: (1) the DOR with respect to a listed tax (as defined in I.C. § 6-8.1-1-1); or (2) the BTR.⁴ Such cases are referred to as "original tax appeals."⁵ "The Tax Court has exclusive statewide jurisdiction over all original tax appeals, and venue of all original tax appeals shall lie only in the Tax Court."⁶ The Tax Court also hears inheritance tax appeals of final determinations from the courts of probate jurisdiction⁷ and certain appeals from the DLGF.⁸ The Tax Court does not have jurisdiction over a case which is an appeal from a final determination made by the Indiana Gaming Commission under I.C. 4-32.2.⁹ However, the Tax Court has jurisdiction over a case that is an appeal from a final determination made by the DOR concerning the gaming card excise tax established under I.C. § 4-32.2-10.¹⁰ The Tax Court also has any other jurisdiction which is conferred by any other statute.¹¹ Thus, the Tax Court does not have jurisdiction over a case unless the case is an original

2. *Berry, Inc. v. Wayne Twp. Assessor*, Nos. 49-900-02-1-7-1 and 49-901-03-1-7-1594 (Ind. Bd. of Tax Review Oct. 6, 2006).

3. IND. CODE § 33-26-3-1 (2004).

4. IND. CODE §§ 33-26-3-1, 6-1.5-5-7 (2006).

5. IND. CODE § 33-26-3-3 (2004); *see also* IND. TAX CT. R. 2.

6. IND. TAX CT. R. 13.

7. IND. CODE § 6-4.1-10-5 (2006).

8. IND. TAX CT. R. 6(B).

9. IND. CODE § 33-26-3-6(a) (2004).

10. *Id.* § 33-26-3-6(b).

11. *Id.* § 33-26-3-2.

tax appeal or the Tax Court has otherwise been specifically assigned jurisdiction by an Indiana statute.¹² A Tax Court judge hears each original tax appeal without the intervention of a jury¹³ and all decisions of the Tax Court are required to be rendered in writing.¹⁴

A. *Property Tax*¹⁵

The GA enacted a variety of changes to property tax legislation. For 2006 only, the Indiana property tax homestead credit is 28%, increased from 20%.¹⁶ For 2006 taxes payable 2007, the standard deduction for the homestead credit is \$45,000, increased from \$35,000. This deduction returns to \$35,000 for assessment year 2007 payable 2008 and future years.¹⁷ All counties must provide uniform property tax statements by 2008, expanding the pilot program that will now expire on January 1, 2008.¹⁸ Counties must begin giving advance notice of proposed rate increases to taxpayers in 2009.¹⁹ Taxpayers will have 45 days from receipt of the notice to request a preliminary conference to initiate an appeal of the current assessment.²⁰

Counties have the option to authorize a “circuit breaker”²¹ that limits residential property taxes to 2% of the property’s assessed value in 2007 (2006 and 2007 for Lake County).²² In 2008 and 2009, the limit will be mandatory for all residential property.²³ In 2010 and thereafter, the cap is to apply to all

12. *Id.* § 33-26-3-3.

13. *Id.* § 33-26-6-1; IND. TAX CT. R. 8(B).

14. IND. CODE § 33-26-6-7(a) (2004); IND. TAX CT. R. 10(A).

15. For an additional list of the property tax provisions which were enacted, during 2006, by the GA during 2006, see Memorandum from Ind. Dep’t of Local Gov’t Fin. to Political Subdivisions, County Auditors, Assessors, and Treasurers, and Twp. and Tr. Assessors (June 2006), www.in.gov/dlgf/docs/2006LegislationMemoFinal060806.doc.

16. IND. CODE § 6-1.1-20.9-2 (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 14 (West)).

17. *Id.* § 6-1.1-12-37 (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 1 (West)).

18. *Id.* § 6-1.1-22-8.1 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 16 (West)).

19. *Id.* § 6-1.1-17-3 (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 3 (West)).

20. *Id.* § 6-1.1-15-1 (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 2 (West)).

21. Unlike most property tax “circuit breakers,” Indiana’s legislation makes no distinction between recipients based on income level. Instead, this legislation is simply a cap on all property taxes. See INST. ON TAXATION AND ECON. POLICY, PROPERTY TAX CIRCUIT BREAKERS, <http://www.itepnet.org/pb10cb.pdf> (last visited June 30, 2007).

22. IND. CODE § 6-1.1-20.6-6 (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 8 (West)).

23. *Id.* § 6-1.1-20.6-6.5(b) (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001)

personal and real property.²⁴ A political subdivision may not increase its property tax levies nor borrow funds to make up for the reduction in property tax collections that will result from this credit.²⁵

Effective January 1, 2006, land held as inventory by a developer may not be reassessed until the assessment date after the earlier of the date the land is transferred to a non-developer, the date construction begins on the land, or the date that a building permit is issued for construction on the land.²⁶ This applies even if the land in inventory is rezoned while the developer holds title to it.²⁷

The GA added wildlands to the types of land that could be classified as forest for property tax purposes and repealed the classification for wildlife habitats.²⁸ It also defined the minimum number of timber-producing trees per acre (at least 400) required to classify land as a new forest plantation or native forest land.²⁹

The GA made various changes to provisions concerning the courts. These affected the tax system in only minor ways. Excessive property tax levies in the first year of a new court's operation are limited to an estimate prepared by the taxing unit that operates the court.³⁰ The GA also listed valid operating costs of a court.³¹

Beginning January 1, 2007, the GA provided for a reduced penalty of 5% (instead of 10%) on late installments of Indiana property tax if the installment is paid within 30 days of the due date and the taxpayer is not liable for delinquent property taxes from previous years.³² A county treasurer may, after July 1, 2006, waive a late payment penalty if the taxpayer or the taxpayer's representative requests waiver and provides written proof that the taxpayer or a member of the taxpayer's immediate family died within seven days prior to the installment due date. A taxpayer is also permitted an appeal of the treasurer's decision with a petition to the BTR.³³

§ 9 (West)).

24. *Id.* § 6-1.1-20.6-6.5(c) (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001)

§ 9 (West)).

25. *Id.* § 6-1.1-20.6-9.5 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 13 (West)).

26. *Id.* § 6-1.1-4-12 (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 1 (West)).

27. *Id.*

28. *Id.* §§ 6-1.1-6-1 to -27 (as amended by 2006 Ind. Legis. Serv. P.L. 66-2006 (S.E.A. 354 (West))). Properly classified land is subject to property taxation at the rate of \$1 per acre. *Id.* § 6-1.1-6-14.

29. *Id.* §§ 6-1.1-6-2(b), 6-1.1-6-3 (as amended by 2006 Ind. Legis. Serv. P.L. 66-2006 (S.E.A. 354) (West)).

30. *Id.* § 6-1.1-18.5-13 (as amended by 2006 Ind. Legis. Serv. P.L. 80-2006 (H.E.A. 1156 (West))).

31. *Id.*

32. *Id.* § 6-1.1-37-10 (as amended by 2006 Ind. Legis. Serv. P.L. 67-2006 (S.E.A. 355) § 11 (West)).

33. *Id.* § 6-1.1-37-10.7 (as added by 2006 Ind. Legis. Serv. P.L. 67-2006 (S.E.A. 555) § 12

Civil and school taxing units may now file a property tax levy appeal to offset a levy shortfall in the preceding year rather than only filing such appeals for the forthcoming year.³⁴ Appeals for the preceding year must be filed before March 1 of the year that the tax is due and must have the approval of the county fiscal body.³⁵

Taxpayers have an additional month, until June 10, to file a statement to claim the Indiana mortgage deduction on real property or manufactured or mobile homes. If the taxpayer does not receive notice of an addition to assessed value by May 10, then the taxpayer has thirty days after the mailing date of the notice to claim the deduction. The deadline for taxpayers to notify the auditor of their ineligibility for the deduction is also June 10.³⁶

Certain used equipment installed in an ERA or a MOD may qualify for a tax abatement if the equipment was not previously used in Indiana by the taxpayer applying for the abatement or an affiliated party. For any type of personal property to be eligible for an ERA, it must be acquired in an arms length transaction from an entity not related to the applicant.³⁷ In addition, certain vacant buildings located in an ERA area may qualify for a property tax abatement for up to two years if the building: has been vacant for at least a year; is occupied by its owner or a tenant of the owner; and is for commercial or industrial purposes.³⁸

Personal property located in golf courses, country clubs, massage parlors, tennis clubs, racetracks, package liquor stores, residential property (other than low income), and other recreational facilities and retail facilities listed in I.C. § 6-1.1-12.1-3(e) does not qualify for the property tax investment deduction.³⁹

Taxing units may impose a maximum ad valorem property tax levy that equals the actual levy rate it imposed in the preceding year plus one-half of the amount by which the previous year's authorized maximum rate exceeded the previous year's actual rate.⁴⁰

Under previous law, the maximum levy in one year was equal to the actual levy imposed in the prior year, resulting in taxing units imposing the maximum

(West)).

34. *Id.* § 6-1.1-18.5-12 (as amended by 2006 Ind. Legis. Serv. P.L. 67-2006 (S.E.A. 355) § 2 (West)).

35. *Id.*

36. *Id.* §§ 6-1.1-12-2, -4, -10.1, -12, -15, -17, -17.5, -17.8, -20, -24, -30, -35.5, -38 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2005 (S.E.A. 260) §§ 11-23 (West)).

37. *Id.* § 6-1.1-12.1-1 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 24 (West)).

38. *Id.* § 6-1.1-12.1-4.8 (as added by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 28 (West)).

39. *Id.* § 6-1.1-12.4-3 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 37 (West)).

40. *Id.* § 6-1.1-18.5-1 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 46 (West)).

levy so that they did not lose the authority in following years.⁴¹ The new legislation partially alleviates the temptation for taxing units to impose levies that are not currently necessary in order to preserve their future taxing authority.⁴² Taxing units may request a higher levy rate if the growth in the assessed value for a unit is more than 2% (down from 3%) higher than the six-year average growth factor.⁴³

The GA authorized creation of a new property tax levy to fund emergency medical services provided by county hospitals.⁴⁴ The maximum levy for this purpose is the lesser of \$0.06 per \$100 of assessed value or a rate sufficient to meet the expenses of providing emergency medical services, but imposition of this levy may not increase a county's overall levy rate above the maximum authorized rate.⁴⁵

The GA authorized counties, other than Marion County, to create housing programs by resolution in allocation areas that meet certain criteria.⁴⁶ A special tax may be levied to fund these housing programs.⁴⁷ Additional property tax revenues due to increases in the allocation area's assessed value over its assessed value before it was established would be deposited into a special fund to be used to promote rehabilitation of the area.⁴⁸

The amount of assessed value of depreciable personal property that is eligible for tax abatement and is subject to the 30% minimum valuation limitation is specified for purposes of computing the deduction. This provision amended I.C. § 6-1.1-12.1-4.5 to add a new section that establishes a formula for determining the assessed value of depreciable personal property eligible for an ERA when the 30% floor is triggered.⁴⁹

41. *Id.*

42. See LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT SB260, at 7-8 (2006), available at <http://www.in.gov/legislative/bills/2006/PDF/FISCAL/SBO260.008.pdf>

43. *Id.* § 6-1.1-18.5-13 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 47 (West)).

44. IND. CODE §§ 16-22-14-1 to -7 (2004) (as added by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 67 (West)).

45. *Id.*

46. *Id.* § 36-7-14-35 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 71 (West)); *id.* § 36-7-14-47 (as added by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 75 (West)).

47. *Id.* § 36-7-14-46 (as added by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 74 (West)).

48. *Id.* § 36-7-14-48 (as added by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 76 (West)).

49. IND. CODE § 6-1.1-12.1-4.5 (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 27 (West)).

B. Other Property Tax Legislation

In 2006, the GA also did the following things, all of which became law.

1. *Senate Enrolled Acts (SEA).*—The GA added I.C. § 8-1.5-5-32 (effective March 15, 2006) that allows excluded cities and towns in a county containing a consolidated city (Marion County) to withdraw from a storm water special taxing district created by the consolidated district.⁵⁰

The GA amended I.C. § 36-9-27-86 (effective January 1, 2006) requiring the county auditor to deliver to the county treasurer final costs for construction or reconstruction of a drain within 30 days of certification to the auditor.⁵¹ This amendment also requires the treasurer to mail a ditch tax statement within 15 days of receipt of the duplicate from the auditor or add a statement to the first property tax installment.⁵² This amendment also specifies that state or a political subdivision which owns property is not exempt from ditch assessments.⁵³ Further, this amendment requires the treasurer to send a list of delinquencies for ditch assessments on state owned property to the state land office.⁵⁴

The GA added a non-code provision (effective January 1, 2006) specifying that Indiana is not entitled to a refund of an assessment paid by Indiana on a notice mailed before January 1, 2006.⁵⁵

The GA amended and corrected I.C. § 6-1.1-4-28.5 (effective March 24, 2006) to specify that the monies in the PTRF may not be transferred or reassigned to any other fund and may not be used for any purpose other than those listed in the statute.⁵⁶

The GA amended I.C. § 6-1.1-5.5-5 (effective March 24, 2006) to require the instructions for completing a sales disclosure form must list property tax benefits available to the purchaser.⁵⁷

The GA amended I.C. § 6-1.1-5.5-6 (effective March 24, 2006) to state the county auditor may not accept a conveyance document unless it is accompanied by a sales disclosure containing all information required by section 5(a) of the statute.⁵⁸

The GA amended I.C. § 6-1.1-8.5-8 (effective March 24, 2006) to prohibit local assessing officials from assessing QIP in Lake County.⁵⁹ The GA amended I.C. § 6-1.1-12-10.1 (effective March 24, 2006) to change the filing date for the over 65 years old deduction from May 10 to June 10.⁶⁰ The GA also amended

50. 2006 Ind. Legs. Serv. P.L. 52-2006 (S.E.A. 71) § 1 (West).

51. *Id.* § 2.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* § 3.

56. 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 2 (West).

57. *Id.* § 3.

58. *Id.* § 4.

59. *Id.* § 8.

60. *Id.* § 13.

I.C. § 6-1.1-12-12 (effective July 1, 2006) to change the filing date for the blind and disabled deduction from May 10 to June 10.⁶¹ The GA amended I.C. § 6-1.1-12-15 (effective March 24, 2006) to change the filing date for the disabled veteran deduction from May 10 to June 10.⁶² The GA further amended I.C. § 6-1.1-12-17 (effective March 24, 2006) to change the filing date for the surviving spouse of a veteran deduction from May 10 to June 10.⁶³ Finally, the GA amended I.C. § 6-1.1-12-17.5 (effective March 24, 2006) to change the filing date for the veteran of World War I deduction from May 10 to June 10.⁶⁴

The GA amended I.C. § 6-1.1-12-17.8 (effective March 24, 2006) to change “his” to “individual” when referencing notification to the auditor of ineligibility for a deduction under chapter 12.⁶⁵

The GA amended I.C. § 6-1.1-12-20 (effective January 1, 2006) to change the filing date for the rehabilitated residential property deduction from May 10 to June 10.⁶⁶ The GA also amended I.C. § 6-1.1-12-24 (effective January 1, 2006) to change the filing date for the rehabilitated property deduction from May 10 to June 10.⁶⁷ The GA amended I.C. § 6-1.1-12-30 (effective January 1, 2006) to change the filing date for the wind power device deduction from May 10 to June 10.⁶⁸ The GA amended I.C. § 6-1.1-12-35.5 (effective January 1, 2006) to change the filing date for the coal conversion system, hydroelectric power device, geothermal heating and cooling device, or coal combustion products deductions from May 10 to June 10.⁶⁹ Additionally, the GA amended I.C. § 6-1.1-12-38 (effective January 1, 2006) to change the filing date for the fertilizer storage improvement deduction from May 10 to June 10.⁷⁰

The GA amended I.C. § 6-1.1-12.1-2 (effective March 24, 2006) to add a fourth standard and related wording which a designating body may establish in considering findings for an area to be considered an ERA.⁷¹ The GA amended I.C. § 6-1.1-12.1-2.5 (effective March 24, 2006) to add language regarding new section 4.8.⁷² This amendment also changed “his” to “the person” when referring to a person filing a remonstrance against an ERA designation.⁷³ The GA added I.C. § 6-1.1-12.1-5.3 (effective March 24, 2006) outlining processing of the deduction application for an ERA under new section 4.8.⁷⁴ The GA amended I.C.

61. *Id.* § 14.

62. *Id.* § 15.

63. *Id.* § 16.

64. *Id.* § 17.

65. *Id.* § 18.

66. *Id.* § 19.

67. *Id.* § 20.

68. *Id.* § 21.

69. *Id.* § 22.

70. *Id.* § 23.

71. *Id.* § 25.

72. *Id.* § 26.

73. *Id.*

74. *Id.* § 29.

§§ 6-1.1-12.1-5.9, 6-1.1-12.1-9, 6-1.1-12.1-12, 6-1.1-12.1-14 (effective March 24, 2006) to add reference to new section 4.8.⁷⁵ Also, the GA amended I.C. § 6-1.1-12.1-8 (effective March 24, 2006) to require the county auditor to publish the total amount of ERAs granted on vacant buildings pursuant to new section 4.8.

Further, the GA added I.C. § 6-1.1-12.1-9.5 (effective January 1, 2006) to define a “clerical error” on an ERA as a mathematical error or omitted signatures.⁷⁶ This provision also allows the designating body, by resolution, to waive non-compliance with the following requirements with respect to an ERA: filing deadline of an application, statement of benefits or other document; and clerical error in an application, statement of benefits or other document.⁷⁷

The GA amended I.C. § 6-1.1-12.1-11.3 (effective March 24, 2006) to add occupation of an eligible vacant building prior to certain actions required for an ERA as a reason for denial of the abatement.⁷⁸

The GA amended I.C. § 6-1.1-12.4-3 (effective January 1, 2006) to clarify that personal property located at a facility listed in I.C. § 6-1.1-12.1-3(e) is not eligible for the investment deduction.⁷⁹

The GA amended I.C. § 6-1.1-14-5 (effective March 24, 2006) to clarify that the DLGF may not issue an equalization order more than 12 months after the county auditor certifies the certificate of net assessed value.⁸⁰

The GA amended I.C. § 6-1.1-17-0.5 (effective March 24, 2006) to allow the county auditor to reduce a taxing unit’s certified net assessed value for pending appeals.⁸¹ This amendment also sets a maximum amount that can be withheld.⁸²

The GA amended I.C. § 6-1.1-17-1 (effective March 24, 2006) to allow the county auditor to file an amended certificate of net assessed value with DLGF under certain circumstances.⁸³

The GA added I.C. § 6-1.1-17-8.5 (effective March 24, 2006) to require the DLGF to review the budget, tax rate, and tax levy for any taxing unit for which the county auditor has filed an amended certificate of net assessed value.⁸⁴ This amendment also allows the county auditor to appeal to the DLGF to withhold an amount of assessed value greater than that allowable by I.C. § 6-1.1-17-0.5 from the certificate of net assessed value.⁸⁵ The GA also amended I.C. § 6-1.1-17-16 (effective July 1, 2006) to amend statutory cites giving the DLGF the authority

75. *Id.* §§ 30, 31, 35-36.

76. *Id.* § 33.

77. *Id.*

78. *Id.* § 34.

79. *Id.* § 37.

80. *Id.* § 38.

81. *Id.* § 41.

82. *Id.*

83. *Id.* § 42.

84. *Id.* § 43.

85. *Id.*

to change a budget, tax rate, or tax levy.⁸⁶ This amendment also clarifies the reasons a taxpayer may appeal a budget, tax rate, or tax levy decision made by the DLGF.⁸⁷

The GA amended I.C. § 6-1.1-18-12 (effective July 1, 2006) to add additional statutory cites for maximum rate cap adjustments for emergency medical services for counties and capital project funds for school corporations.⁸⁸

The GA amended I.C. § 6-1.1-18.5-17 (effective January 1, 2006) to specify that “levy excess” for a civil taxing unit does not include delinquent property taxes collected in the current year that were assessed for a previous assessment date.⁸⁹ The GA amended I.C. § 6-1.1-19-1.7 (effective January 1, 2006) to specify that “levy excess” for a school corporation does not include delinquent property taxes collected in the current year that were assessed for a previous assessment date.⁹⁰

The GA amended I.C. § 6-1.1-20.9-3 (effective March 24, 2006) to change the filing date for the homestead credit from May 10 to June 10.⁹¹

The GA amended I.C. § 6-1.1-30-6 (effective March 24, 2006) to change the attestation of a record of proceedings of the DLGF to be completed by a designee of the commissioner instead of a deputy commissioner.⁹²

The GA added I.C. § 6-1.1-36-1.5 (effective July 1, 2006) to specify when a form is considered file by a due date under I.C. § 6-1.1 or I.C. § 6-1.5 (a “mailbox rule”).⁹³

The GA amended I.C. § 6-1.1-36-12 (effective January 1, 2006) to eliminate the payment of a contractor’s fee for personal property auditing services from the gross amount of personal property taxes collected on undervalued or omitted personal property.⁹⁴ This amendment also adds a provision authorizing the county auditor to create a special non-reverting fund for the purpose of paying the contract fees without an appropriation.⁹⁵ Money remaining in the fund at the expiration of the contract after the contractor has been paid shall be distributed to the taxing units based on the rates then in effect.⁹⁶

The GA amended I.C. § 6-1.1-37-10 (effective July 1, 2006) to add additional language specifying when a tax payment is considered paid by a due date (a “mailbox rule”).⁹⁷

The GA amended I.C. § 6-1.1-39-5 (effective January 1, 2006) to require the

86. *Id.* § 44.

87. *Id.*

88. *Id.* § 45.

89. *Id.* § 48.

90. *Id.* § 49.

91. *Id.* § 50.

92. *Id.* § 51.

93. *Id.* § 53.

94. *Id.* § 54.

95. *Id.*

96. *Id.*

97. *Id.* § 55.

DLGF to neutralize the base assessed value in an EDD after each annual adjustment.⁹⁸

The GA added I.C. § 6-1.1-40-1.5 (effective January 1, 2006) to define an “affiliate” for the purposes of a deduction for personal property in a MOD.⁹⁹

The GA amended I.C. § 6-1.1-40-4 (effective January 1, 2006) to require that for any type of personal property to be eligible for a MOD deduction, it must be acquired in an arms length transaction from an entity which is not an affiliate of the applicant.¹⁰⁰ This amendment also requires that to be eligible, the property must never have been used for any purpose in Indiana before its installation.¹⁰¹

The GA amended I.C. § 6-1.1-40-10 (effective July 1, 2006) to add a section (e) that establishes a formula for determining the assessed value of depreciable personal property eligible for a MOD when the 30% floor is triggered.¹⁰²

The GA amended I.C. § 6-1.1-45-9 (effective July 1, 2006) to add a section (c) that requires the MBRAB to approve a deduction for a qualified investment made in an enterprise zone that is under the jurisdiction of a MBRAD.¹⁰³

The GA added I.C. § 6-1.5-4-2 (effective March 24, 2006) to give the BTR and its administrative law judges the authority to: subpoena and examine witnesses; administer oaths; and subpoena and examine books or papers that are in the hands of any person.¹⁰⁴

The GA amended I.C. § 6-1.5-5-2 (effective March 24, 2006) to clarify wording regarding local taxing units’ position in an appeal before the BTR.¹⁰⁵

The GA amended I.C. § 8-1.5-5-32 (effective March 24, 2006) to change the word “district” to “municipality.”¹⁰⁶

The GA amended I.C. § 8-22-3.5-11 (effective January 1, 2006) to require the DLGF to neutralize the base assessed value in an airport development zone after each annual adjustment.¹⁰⁷

The GA amended I.C. § 20-44-3-2 (effective July 1, 2006) to specify that “levy excess” for a school corporation does not include delinquent property taxes collected in the current year that were assessed for a previous assessment date.¹⁰⁸

The GA amended I.C. § 20-46-6-5 (effective July 1, 2006) to require DLGF to adjust the maximum rate for a school corporation’s capital project fund for the effects of a general reassessment.¹⁰⁹

The GA amended I.C. § 36-7-14-39, I.C. § 36-7-15.1-26, I.C. § 36-7-15.1-53,

98. *Id.* § 56.

99. *Id.* § 57.

100. *Id.* § 58.

101. *Id.*

102. *Id.* § 59.

103. *Id.* § 60.

104. *Id.* § 61.

105. *Id.* § 62.

106. *Id.* § 65.

107. *Id.* § 66.

108. *Id.* § 68.

109. *Id.* § 69.

I.C. § 36-7-30-25, I.C. § 36-7-30.5-30, I.C. § 36-7-32-19 (effective January 1, 2006) all to require the DLGF to neutralize the base assessed value in a TIF district after each annual adjustment.¹¹⁰

The GA added I.C. § 36-7-14-45 (effective July 1, 2006) to allow a redevelopment commission to establish a housing program allocation area by resolution.¹¹¹

The GA added I.C. § 36-7-14-47 (effective July 1, 2006) which lists the findings a redevelopment commission must make in the resolution adopting a housing program.¹¹²

The GA granted a personal property ERA to a grey iron foundry located in Grant County (Atlas Foundry) for assessment years beginning in 2001.¹¹³

The GA granted a property tax exemption to a fraternity at Butler University for assessment years 2000 through 2003.¹¹⁴

The GA granted retroactive validation of a property tax exemption to Zionsville Youth Soccer for assessment years 1999 through 2003.¹¹⁵

The GA clarified that the expansion of eligibility for personal property ERA for equipment used in Indiana by a person other than the deduction applicant before it was installed in the ERA applies only to equipment installed and initially used after December 31, 2005.¹¹⁶

The GA allowed special fire districts with rapid assessed value growth to seek a maximum levy increase from DLGF.¹¹⁷

The GA granted retroactive validation of a sales tax exemption for Hartford City Little League for 2002 through 2005.¹¹⁸

The GA granted retroactive validation of a property tax exemption for the Madame Walker Theater for taxes payable in 2005.¹¹⁹

The GA allowed for 2005 taxes payable 2006, a personal property tax return filed up to 30 days late to be considered timely filed, and any exemptions claimed are not waived by the late filing.¹²⁰

The GA raised the maximum levy for Jasper and Dubois Counties' libraries.¹²¹

The GA allowed Aqua Indiana to claim a credit against the 2007 property taxes for an error made on its 2005 distributable property return.¹²²

110. *Id.* §§ 72, 77-81.

111. *Id.* § 73.

112. *Id.* § 75.

113. *Id.* § 83 (non-code provision).

114. *Id.* § 84 (non-code provision).

115. *Id.* § 85 (non-code provision).

116. *Id.* § 86 (non-code provision).

117. *Id.* § 87 (non-code provision).

118. *Id.* § 88 (non-code provision).

119. *Id.* § 89 (non-code provision).

120. *Id.* § 90 (non-code provision).

121. *Id.* § 91 (non-code provision).

122. *Id.* § 93 (non-code provision).

The GA allowed Middlebury Township, Elkhart County, to seek a maximum levy increase to cover costs of emergency medical services.¹²³

The GA required the DLGF to develop a recommendation to the legislative council to adjust maximum permissible levies for property taxes first due and payable after 2007.¹²⁴

The GA allowed the DLGF to adopt temporary rules to implement the investment deduction found in I.C. § 6-1.1-12.4.¹²⁵

The GA amended I.C. § 6-1.1-21-10 (effective January 1, 2007) to change the schedule for PTRC distribution from six monthly distributions to seven variable percentage monthly distributions annually.¹²⁶

The GA added I.C. § 6-1.1-6-2.5 (effective July 1, 2006) to create “wildlands” as a new category of classified forest land.¹²⁷ Wildlands must contain one or more of the following:

- (1) Grasslands that are dominated by native grasses
- (2) Wetlands that support a prevalence of native vegetation
- (3) Early forest successional stands ;
- (4) Other lands [the DNR] determines is capable of supporting wildlife
- (5) A body of water.¹²⁸

The GA amended I.C. § 6-1.1-6-3 (effective July 1, 2006) to require classified native forest land to have at least 1000 timber producing trees per acre.¹²⁹ The statute formerly required 400 trees per acre.¹³⁰ The GA amended I.C. § 6-1.1-6-3.5 (effective July 1, 2006) to clarify areas within classified forest land that are eligible for classification.¹³¹ The GA amended I.C. § 6-1.1-6-5 (effective July 1, 2006) to add “wildlands” to the requirement that the classified parcel must contain at least 10 contiguous acres.¹³²

The GA amended I.C. § 6-1.1-6-5.5 (effective July 1, 2006) to allow a taxpayer to file a revised application for classification.¹³³ It also added reference to “wildlands.”¹³⁴ The GA amended I.C. § 6-1.1-6-6 (effective July 1, 2006) to add “wildlands” to the requirement that the classified parcel may not have an improvement situated on it.¹³⁵ The GA amended I.C. § 6-1.1-6-7 (effective July

123. *Id.* § 94 (non-code provision).

124. *Id.* § 95 (non-code provision).

125. *Id.* § 96 (non-code provision).

126. 2006 Ind. Legis. Serv. P.L. 159-2006 (S.E.A. 345) § 1 (West).

127. 2006 Ind. Legis. Serv. P.L. 66-2006 (S.E.A. 354) § 2 (West).

128. *Id.*

129. *Id.* § 4.

130. *Id.*

131. *Id.* § 5.

132. *Id.* § 6.

133. *Id.* § 7.

134. *Id.*

135. *Id.* § 8.

1, 2006) to add “wildlands” to the requirement that the classified parcel may not have grazing or confined non-domestic animals on it.¹³⁶

The GA amended I.C. § 6-1.1-6-9 (effective July 1, 2006) to allow the natural resources commission to adopt rules allowing a taxpayer to submit other means of describing and platting a parcel other than a registered land survey.¹³⁷

The GA amended I.C. § 6-1.1-6-10 (effective July 1, 2006) to correct the spelling of “assessor” (sic) to “assessor.”¹³⁸ This section is also repealed in this bill.¹³⁹

The GA amended I.C. § 6-1.1-6-11 (effective July 1, 2006) to include “wildlands” in the application process.¹⁴⁰

The GA amended I.C. § 6-1.1-6-13 (effective July 1, 2006) to make minor technical changes.¹⁴¹

The GA amended I.C. §§ 6-1.1-6-14, -15, -16, -18, -19, -21, and -23 (effective July 1, 2006) to add the term “wildlands.”¹⁴²

The GA amended I.C. § 6-1.1-6-20 (effective July 1, 2006) to add provision allowing a retroactive revised application.¹⁴³

The GA amended I.C. § 6-1.1-6-24 (effective July 1, 2006) to add a penalty for withdrawal of land from classification after June 30, 2006 in an amount of \$100 per withdrawal plus \$50 per acre (unless DNR establishes a different amount by rule).¹⁴⁴ Seventy-five percent of this new penalty is transferred to the forest restoration fund and 25% goes into the county general fund.¹⁴⁵ This penalty is in addition to back taxes and the 10% interest already in the statute.¹⁴⁶

The GA amended I.C. § 6-1.1-6-25 (effective July 1, 2006) to require the owner splitting a classified parcel to file new, separate applications for each parcel.¹⁴⁷ This amendment also requires the owner to disclose to a potential purchaser that the land is enrolled in a classified land program and the potential tax liabilities.¹⁴⁸

The GA amended I.C. § 6-1.1-6-27 and I.C. § 6-1.1-6.2-15 (effective July 1, 2006) to add wildlands.¹⁴⁹

The GA amended I.C. § 14-23-4-2 (effective July 1, 2006) to redefine

136. *Id.* § 9.

137. *Id.* § 10.

138. *Id.* § 11.

139. *Id.*

140. *Id.* § 12.

141. *Id.* § 13.

142. *Id.* §§ 14-18, 20-21.

143. *Id.* § 19.

144. *Id.* § 22.

145. *Id.*

146. *Id.*

147. *Id.* § 23.

148. *Id.*

149. *Id.* §§ 24-25.

“merchantable timber.”¹⁵⁰

The GA repealed the following:

- (1) I.C. § 6-1.1-6-10—Assessment required.
- (2) I.C. § 6-1.1-6-22—Withdrawal of application; appeals.
- (3) I.C. § 6-1.1-6-6.5—Assessment of certain wildlife habitats.
- (4) I.C. § 14-36-1-36—Land not classified as native forest land or forest plantations.¹⁵¹

The GA reclassified land classified as “wildlife habitat” under I.C. § 6-1.1-6.5 (repealed) to “wildlands” under I.C. § 6-1.1-6.¹⁵²

The GA amended I.C. § 6-1.1-1-8 (effective July 1, 2006) to add I.C. § 6-1.1-37-10.7 to the definition of “general assessment provisions.”¹⁵³

The GA amended I.C. § 6-1.1-19-2 (effective March 17, 2006) to specify that a school corporation must file an appeal for emergency financial relief with the DLGF for the ensuing calendar before September 20 of the calendar year immediately preceding the ensuing calendar year.¹⁵⁴ This amendment also allows a shortfall appeal to be filed (1) before December 31, or (2) before March 1 with the approval of the county fiscal body.¹⁵⁵ Further, this amendment requires the fiscal officer of the appealing school corporation to file a copy of the appeal petition with the county auditor and treasurer.¹⁵⁶

The GA amended I.C. § 6-1.1-21-2 (effective March 17, 2006) to eliminate “on or before March 1” from the definition of the “Auditor’s abstract.”¹⁵⁷ This amendment also corrected the definition of “total county tax levy” to change the statutory cite for library capital project funds and art association funds.¹⁵⁸ Further, this amendment eliminated “on or before March 1” from the definition of “tax duplicate.”¹⁵⁹

The GA amended I.C. § 6-1.1-22-3 (effective March 17, 2006) to add language requiring a county auditor who receives a copy of an appeal petition for levy relief or emergency financial relief filed with the DLGF to postpone preparation of the tax duplicate until the appeal is resolved.¹⁶⁰ If the tax duplicate has been prepared prior to receipt of the copy of the appeal, the county auditor must prepare a revised tax duplicate after the appeal is resolved.¹⁶¹ The GA also amended I.C. § 6-1.1-22-5 (effective March 17, 2006) to add language requiring

150. *Id.* § 28.

151. *Id.* § 30.

152. *Id.* § 32.

153. 2006 Ind. Legis. Serv. P.L. 67-2006 (S.E.A. 355) § 1 (West).

154. *Id.* § 3.

155. *Id.*

156. *Id.*

157. *Id.* § 4.

158. *Id.*

159. *Id.*

160. *Id.* § 5.

161. *Id.*

a county auditor who receives a copy of an appeal petition for levy relief or emergency financial relief filed with the DLGF to postpone preparing and filing of the abstract until the appeal is resolved.¹⁶² If the abstract has been prepared prior to receipt of the copy of the appeal, the county auditor must prepare a revised abstract after the appeal is resolved.¹⁶³

The GA amended I.C. § 6-1.1-22-9 (effective March 17, 2006) allowing a county treasurer who receives a copy of an appeal petition for levy relief or emergency financial relief filed with the DLGF prior to mailing of tax statements to either:

- (1) mail the tax statements without regard to the pendency of the appeal and, if the resolution of the appeal by the [DLGI] results in changes in levies, mail or transmit reconciling statements . . . ; or,
- (2) delay the mailing or transmission of statements . . . so that:
 - (A) the due date of the first installment . . . is delayed by not more than sixty (60) days past; and
 - (B) all statements reflect any changes in levies that result from the resolution of the appeal¹⁶⁴

The reconciling statements referred to in (1) above must indicate: (1) the total amount due for the year; (2) the total amount of the installments paid to date; (3) any additional payments due from the taxpayer; and (4) any refunds due to the taxpayer.¹⁶⁵

The GA amended I.C. § 6-1.1-22-9.5 (effective March 17, 2006) to specify only the county fiscal body has to approve a petition to the DLGF to modify property tax payment dates.¹⁶⁶ This amendment also eliminated the requirement that the county auditor and treasurer must also approve the petition.¹⁶⁷

The GA amended I.C. § 6-1.1-22.5-6 (effective March 17, 2006) to prohibit provisional property tax statements from being used if the county auditor fails to deliver the abstract due to a levy appeal pending before DLGF.¹⁶⁸

The GA amended I.C. § 6-1.1-37-9 (effective July 1, 2006) to clarify wording regarding interest charged when a change of assessment is made or increased after the property taxes were due.¹⁶⁹

The GA amended I.C. § 14-33-10-3 (effective January 1, 2007) to apply the 5% interest rate as applies to unpaid property taxes to unpaid assessments for a

162. *Id.* § 6.

163. *Id.*

164. *Id.* § 7.

165. *Id.*

166. *Id.* § 8.

167. *Id.*

168. *Id.* § 9.

169. *Id.* § 10.

conservancy district.¹⁷⁰

The GA amended I.C. § 36-9-37-19 (effective January 1, 2007) to apply the 5% interest rate as applies to unpaid property taxes to unpaid municipal water utility assessments.¹⁷¹

The GA added a non-code provision that allows delayed property tax payments made in 2005 for assessment years 2002, 2003, and 2004, to be deducted from adjusted gross income for the purposes of the state income tax (effective January 1, 2006).¹⁷²

2. *House Enrolled Acts (HEA)*.—The GA amended I.C. § 6-1.1-17-3 (effective July 1, 2006) to require, beginning in 2009, a political subdivision to complete its budget, tax levy, and proposed tax rate, and to publish and report this information to the county auditor before August 10 of the calendar year.¹⁷³ This amendment also requires the county auditor to send a notice to each taxpayer by August 10 outlining the current year's assessed value, property tax liability to each political subdivision, comparative property tax information for each political subdivision, and the date of the public hearing on each political subdivision's budget, rate, and levy.¹⁷⁴

The GA amended I.C. § 6-1.1-21-3 (effective January 1, 2006) to require DLGF to make the certifications of eligible property tax replacement amount and homestead credits to the DOR based on the best information available at the time the certification is made.¹⁷⁵

The GA amended I.C. § 6-1.1-20-10 (effective March 24, 2006) to prohibit a political subdivision from compelling an employee or student to promote a position on a petition or remonstrance on a bond or lease.¹⁷⁶ This amendment also prohibits: the staff and employees of a school corporation from identifying a student as the child of a parent/guardian who has taken a position on the petition or remonstrance; a person or organization that has a contract, or formal or informal arrangement with a school corporation, to spend monies to promote a position on the petition; and an attorney, architect, construction manager, or a financial advisor with respect to a controlled project to spend monies to promote a position on the petition.¹⁷⁷

The GA added I.C. § 6-1.1-20-11 (effective July 1, 2006) to establish test for the validity of a signature on a document required for a petition and remonstrance procedure.¹⁷⁸

The GA amended I.C. § 6-1.1-20.6-4 (effective March 24, 2006) to make the definition of “qualified residential property” (apartment complex, homestead, and

170. *Id.* § 13.

171. *Id.* § 16.

172. *Id.* § 22.

173. *Id.* § 3.

174. 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 2 (West).

175. *Id.* § 4.

176. *Id.* § 5.

177. *Id.*

178. *Id.* § 6.

residential rental property) also apply to new property.¹⁷⁹

The GA amended I.C. § 6-1.1-20.6-6 (effective March 24, 2006) to allow the county fiscal body to establish an excessive residential property tax credit for taxes due and payable before January 1, 2007 for Lake County and for taxes due and payable before January 1, 2008 for all other counties.¹⁸⁰

The GA added a subsection to I.C. § 6-1.1-20.6-7 (effective March 24, 2006) to set the excessive property tax credit at 2% of gross assessed value for all real *and personal property* for taxes first due and payable after December 31, 2009.¹⁸¹

The GA amended I.C. § 6-1.1-20.6-8 (effective March 24, 2006) to not require any real or personal property owner to apply for the excessive property tax credit.¹⁸²

The GA added a subsection to I.C. § 6-1.1-20.6-9 (effective March 24, 2006) to require the county auditor to notify each political subdivision in which the credit under this chapter is applied of the reduction for the political subdivision.¹⁸³

The GA amended I.C. § 6-1.1-22-8 (effective July 1, 2006) to expire January 1, 2008.¹⁸⁴

The GA added I.C. § 6-1.1-22-8.1 (effective July 1, 2006) to replace I.C. § 6-1.1-22-8 upon its expiration.¹⁸⁵ This amendment also requires the county treasurer to mail a tax bill in the form prescribed by the DLGF.¹⁸⁶ The form must include at least the following:

- (1) A statement of the taxpayer's current and delinquent taxes and special assessments.
- (2) A breakdown showing the total property tax and special assessment liability and the amount of the taxpayer's liability that will be distributed to each taxing unit in the county.
- (3) An itemized listing for each property tax levy, including:
 - (A) the amount of the tax rate;
 - (B) the entity levying the tax owed; and
 - (C) the dollar amount of the tax owed.
- (4) Information designed to show the manner in which the taxes and special assessments billed in the tax statement are to be used.
- (5) A comparison showing any change in the assessed valuation for the property as compared to the previous year.
- (6) A comparison showing any change in the property tax and special assessment liability for the property as compared to the previous

179. *Id.* § 7.

180. *Id.* § 8.

181. *Id.* § 10.

182. *Id.* § 11.

183. *Id.* § 12.

184. *Id.* § 15.

185. *Id.* § 16.

186. *Id.*

year. The information required under this subdivision must identify:

- (A) the amount of the taxpayer's liability distributable to each taxing unit in which the property is located in the current year; and
 - (B) the percentage change, if any, in the amount of the taxpayer's liability distributable to each taxing unit in which the property is located from the previous year to the current year.
- (7) An explanation of the following:
- (A) The homestead credit and all property tax deductions.
 - (B) The procedure and deadline for filing for the homestead credit and each deduction.
 - (C) The procedure that a taxpayer must follow to:
 - (i) appeal a current assessment; or
 - (ii) petition for the correction of an error
 - (D) The forms that must be filed for an appeal or a petition
- (8) A checklist that shows:
- (A) the homestead credit and all property tax deductions; and
 - (B) whether the homestead credit and each property tax deduction applies in the current statement for the property¹⁸⁷

The GA amended I.C. § 6-3.5-7-5 (effective March 24, 2006) to set the maximum COIT and the EDIT rates for Scott County to not exceed 1.25% and the maximum CEDIT rate and the CAGIT rate for Jasper County not to exceed 1.5%.¹⁸⁸

The GA amended I.C. § 6-3.5-7-26 (effective March 24, 2006) to provide that residential PTRC, in addition to homestead credits, may be paid from increased CEDIT to offset the loss of property taxes from the inventory deduction.¹⁸⁹

The GA added I.C. §§ 6-9-39-1 to -9 (effective July 1, 2006) to create a county option dog tax not to exceed \$5.00 per taxable dog.¹⁹⁰ Twenty percent of the optional dog tax is sent to the state for canine research and education and the remaining 80% is retained by the county for various specified uses related to animal care.¹⁹¹ The GA amended I.C. § 15-5-7-1 (effective July 1, 2006) to eliminate the triple damages award paid by owners of unlicensed dogs.¹⁹² The GA added I.C. § 15-5-7-3 (effective July 1, 2006) to require the county to pay the

187. *Id.*

188. *Id.* § 33.

189. *Id.* § 34.

190. *Id.* § 36.

191. *Id.*

192. *Id.* § 37.

damages caused by attack or exposure by dogs to livestock and for post exposure treatment incurred by any person who is bitten by or exposed to a dog known to have rabies.¹⁹³

The GA added I.C. § 6-15-5-7-4 (effective July 1, 2006) to outline the filing of a claim against a county under I.C. § 15-5-7-3.¹⁹⁴

The GA amended I.C. § 20-45-1-21 (effective July 1, 2006) to change the definition of “total assessed value” for the purposes of the school adjustment factor used in the distribution of tuition support payments to schools.¹⁹⁵

The GA amended I.C. § 20-45-3-6 (effective July 1, 2006) to clarify a school corporation’s target property tax rate used in the distribution tuition support payments to schools.¹⁹⁶

The GA amended I.C. § 36-6-5-3 (effective July 1, 2006) to remove from assessment duties the administration of the dog tax.¹⁹⁷ The GA repealed I.C. §§ 15-5-9 and -10 (effective July 1, 2006) that allowed for the imposition of a dog tax and the treatment of dogs as personal property.¹⁹⁸

The GA added a non-code provision that allows a county to adopt an ordinance allowing for a credit for excessive residential property taxes for property taxes first due and payable in 2006 if tax statements for 2006 have not yet been issued.¹⁹⁹ This section expired January 1, 2007 (effective March 24, 2006).²⁰⁰

The GA added a non-code provision that distributes money remaining in the state dog account on June 30, 2006 on a prorated basis of 50% to Purdue University School of Veterinary Science and Medicine and 50% to counties that paid the state from the counties’ dog funds.²⁰¹ This amendment also specifies how the counties’ share of the distribution may be spent (effective July 1, 2006).²⁰²

The GA added a non-code provision defining the “additional 2006 homestead credit” is the part of the homestead credit that exceeds 20% (effective March 24, 2006).²⁰³ This amendment also states the definitions contained in I.C. §§ 6-1.1-1, 20.9, and 21 apply to the application of this credit.²⁰⁴ Further, this amendment provides instructions to the county auditor as to how to administer the credit.²⁰⁵

The GA amended I.C. § 36-4-3-4.1 (effective July 1, 2006) to allow a town

193. *Id.* § 38.

194. *Id.* § 39.

195. *Id.* § 44.

196. *Id.* § 46.

197. *Id.* § 48.

198. *Id.* § 49.

199. *Id.* § 50.

200. *Id.*

201. *Id.* § 51.

202. *Id.*

203. *Id.* § 57.

204. *Id.*

205. *Id.*

having a population of more than 15,000 or a town with a population more than 5000 but less than 6300 in a county with a total population of more than 100,000 but less than 105,000 to exempt newly annexed, contiguous, agriculturally zoned property from municipal property taxes if the ordinance is adopted before June 30, 2006.²⁰⁶ If adopted after June 30, 2006, the amendment limits the exemption to ten years.²⁰⁷ This amendment also requires the consent of the property owner to change zoning classification.²⁰⁸

The GA amended I.C. § 5-3-1-0.4 (effective March 24, 2006) to expand the definition of a “newspaper” that can be used for publication of notices.²⁰⁹

The GA amended I.C. § 5-3-1-2.3 (effective July 1, 2006) to specify that a tax adjustment board chart or DLGF budget order published by the county auditor in accordance with this chapter is valid even if it contains an error.²¹⁰ This amendment also allows the DLGF to correct an error or omission in the publication and requires the county auditor to publish the correction at the county’s expense.²¹¹

The GA amended I.C. § 6-1.1-17-5 (effective July 1, 2006) to require a municipality to set its budget, tax rate, and tax levy by September 30 each year.²¹²

The GA amended I.C. § 6-1.1-17-16 (effective July 1, 2006) to allow the DLGF to correct the budget, tax rate, or tax levy if it was incorrectly published or omitted in the publication by the county auditor.²¹³ This amendment also allows a political subdivision two weeks, instead of one, to respond to the DLGF’s proposal to change a tax rate or levy.²¹⁴

The GA amended I.C. § 6-1.1-22-8 (effective January 1, 2007) to allow the county treasurer to include on the tax bill the dollar amount of each special assessment owed.²¹⁵

The GA amended I.C. § 6-1.1-22-11 (effective January 1, 2007) to increase the interest paid by a property tax lien holder to 10% from 6%.²¹⁶

The GA added I.C. § 6-1.1-22-13.5 (effective January 1, 2007) to specify that a political subdivision acquires a lien on real property for all special assessments levied and all subsequent costs and penalties resulting from the special assessments.²¹⁷ The lien attaches on the installment due date of the year for which the special assessments are certified.²¹⁸ The lien is not affected by any

206. 2006 Ind. Legis. Serv. P.L. 71-2006 (H.E.A. 1089) § 1 (West).

207. *Id.*

208. *Id.*

209. 2006 Ind. Legis. Serv. P.L. 169-2006 (H.E.A. 1102) § 1 (West).

210. *Id.* § 2.

211. *Id.*

212. *Id.* § 8.

213. *Id.* § 9.

214. *Id.*

215. *Id.* § 10.

216. *Id.* § 11.

217. *Id.* § 12.

218. *Id.*

sale or transfer of the real property.²¹⁹ The lien is superior to all other liens except property taxes.²²⁰ A political subdivision may sue for settlement of the lien.²²¹

The GA amended I.C. § 6-1.1-24-1.5 (effective January 1, 2007) to require that the county executive, instead of the MDC, prepare a list of properties that are vacant or abandoned and certify the list to the county auditor.²²²

The GA amended I.C. § 6-1.1-24-2.2 (effective January 1, 2007) to remove the provision allowing the filing of an affidavit by the owner of vacant or abandoned property to remove it from the tax sale because it is inhabitable under law.²²³

The GA amended I.C. § 6-1.1-24-3 (effective January 1, 2007) to add that notices mailed under this section and advertisement made under this chapter are considered sufficient notice of the intended application for judgment and of the sale of real property under the order of the court.²²⁴

The GA amended I.C. § 6-1.1-24-4(b) (effective January 1, 2007) to apply state-wide instead of just to a county having a consolidated city.²²⁵

The GA amended I.C. § 6-1.1-24-4.6 (effective January 1, 2007) to add wording to the county auditor's affidavit swearing that notice for application for judgment and order for sale was mailed by certified mail to the owners on the list.²²⁶ This amendment also requires the county auditor to enter the name of at least one owner of each tract of real property, the dates of publications, and the mailing dates of the notices to the list attached to the affidavit.²²⁷

The GA amended I.C. § 6-1.1-24-4.7 (effective January 1, 2007) to require the final listing of the judgment and order for sale to contain the name of at least one of the owners of each tract of real property.²²⁸

The GA amended I.C. § 6-1.1-24-6.1 (effective January 1, 2007) to allow the county executive to offer to the public the certificates of sale acquired under I.C. § 6-1.1-24-6.²²⁹

The GA amended I.C. § 6-1.1-25-3 (effective January 1, 2007) to state that when real property that was sold under I.C. § 6-1.1-24-6.1 is redeemed, the county auditor will issue to the purchaser of a certificate stating the amount received for redemption minus an amount equal to the difference between the minimum bid and the amount for which the certificate sold.²³⁰

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* § 14.

223. *Id.* § 16.

224. *Id.* § 17.

225. *Id.* § 18.

226. *Id.* § 19.

227. *Id.*

228. *Id.* § 20.

229. *Id.* § 24.

230. *Id.* § 27.

The GA amended I.C. § 6-1.1-25-4 (effective January 1, 2007) to clarify the periods of redemption for real property.²³¹ This amendment also clarifies the powers of the county executive who has been issued a tax deed.²³²

The GA amended I.C. § 6-1.1-25-4.5 (effective January 1, 2007) to clarify eligibility to obtain a tax deed to real property.²³³

The GA amended I.C. § 6-1.1-25-4.6 (effective January 1, 2007) to add the county executive to the list of persons who may give notice of filing of a petition for tax deed.²³⁴

The GA amended I.C. § 12-20-21-2 (effective July 1, 2006) to clarify that township assistance money may not be commingled.²³⁵

The GA amended I.C. § 12-20-24-1 (effective July 1, 2006) to clarify the township trustee must appeal to the DLGF for the right to borrow money on a short term basis to fund township assistance services in the township.²³⁶

The GA amended I.C. § 12-20-24-5 (effective July 1, 2006) to address the decision of the DLGF for appeals brought under I.C. § 12-20-24-1.²³⁷

The GA amended I.C. § 12-20-24-6 (effective July 1, 2006) to allow the county commissioners or county council to only approve the repayment periods on loans approved under I.C. § 12-2-4.5 or 12-20-24 for loans they approved prior to June 30, 2006.²³⁸

The GA amended I.C. § 12-20-24-7 (effective July 1, 2006) to specify reasons why the county commissioners or council or DLGF may not approve a loan under I.C. § 12-2-4.5 or 12-20-24.²³⁹

The GA amended I.C. § 12-20-24-8 (effective July 1, 2006) to specify the approval time frames for permission to borrow money under this chapter.²⁴⁰

The GA amended I.C. § 12-20-25-30 (effective July 1, 2006) to change the applicable cite for the control board's supervision of the township trustee's administration of assistance loan from I.C. § 12-20-23 to I.C. § 12-20-24.²⁴¹

The GA amended I.C. § 12-20-25-40 (effective July 1, 2006) to allow loans made under I.C. § 12-20-23 to be repaid after its repeal.²⁴²

The GA amended I.C. § 12-20-25-42 (effective July 1, 2006) to allow loans made under I.C. § 12-20-23-15 and 19 to be repaid after their repeal.²⁴³

The GA amended I.C. § 36-1-8-5 (effective March 24, 2006) to allow

231. *Id.* § 28.

232. *Id.*

233. *Id.* § 29.

234. *Id.* § 30.

235. *Id.* § 35.

236. *Id.* § 36.

237. *Id.* § 37.

238. *Id.* § 38.

239. *Id.* § 39.

240. *Id.* § 40.

241. *Id.* § 41.

242. *Id.* § 42.

243. *Id.* § 43.

political subdivisions to transfer money into their rainy day fund at any time during the fiscal year.²⁴⁴

The GA added I.C. § 36-1-8-16 (effective July 1, 2006) to require that the first year's property taxes collected on real property disposed of by a county executive to be disbursed to the county executive for deposit in the county general fund, the redevelopment fund, the unsafe building fund, or the housing trust fund.²⁴⁵

The GA amended I.C. § 36-4-7-3 (effective July 1, 2006) to require compensation of each appointed officer, deputy and other employees of the city must be fixed not later than September 30 of each year.²⁴⁶ This amendment also allows compensation to be increased or decreased by the city executive.²⁴⁷

The GA amended I.C. § 36-4-7-11 (effective July 1, 2006) to specify that if a city legislative body does not pass a budget and levy ordinance before October 1 of each year, the most recent annual appropriations and tax levy are continued for the ensuing budget year.²⁴⁸

The GA amended I.C. § 36-6-6-10 (effective July 1, 2006) to read that in a year in which there is not an election of members to the township legislative body, the township legislative body may, by unanimous vote, reduce the salaries of the township legislative body by any amount.²⁴⁹

The GA amended I.C. § 36-7-14-22.5 (effective July 1, 2006) to allow a redevelopment commission that acquired real property the right to dispose of real property not needed for a redevelopment activity.²⁵⁰ This amendment also allows the commission to hold such real property for sale at a later date and this amendment allows the commission to rehabilitate or rent the property while it is being held and to enter into contracts to carry out these functions.²⁵¹ Further, this amendment allows the commission to extinguish all delinquent taxes, special assessments, and penalties.²⁵²

The GA amended I.C. § 36-7-17-3 (effective July 1, 2006) to eliminate the provision that allowed the agency responsible for regulating property to acquire property for urban homesteading or redevelopment purposes.²⁵³

The GA amended I.C. § 36-8-3-3 (effective July 1, 2006) to require the annual setting of compensation for police and fire departments and other appointees to be fixed by ordinance of the legislative body not later than September 30 of each year for the ensuing budget year.²⁵⁴

244. *Id.* § 46.

245. *Id.* § 47.

246. *Id.* § 54.

247. *Id.*

248. *Id.* § 55.

249. *Id.* § 56.

250. *Id.* § 70.

251. *Id.*

252. *Id.*

253. *Id.* § 76.

254. *Id.* § 78.

The GA added I.C. § 36-9-39.1 (effective July 1, 2006) to allow a municipality to create a sewer improvement and extension fund and finance it through special assessments.²⁵⁵

Non-code provisions repealed the following:

- (1) County having a consolidated city; metropolitan development commission list; affidavit of owner (I.C. § 6-1.1-24-4.1);
- (2) Second offer for sale of property (I.C. § 6-1.1-24-5.5); and,
- (3) Distribution of proceeds of sale of certificates of sale; tax sale surplus fund; county auditor duty on assignment of certificate (I.C. § 6-1.1-24- 6.5).²⁵⁶

Non-code provisions also repealed the following:

- (1) Insufficient funds; county general fund appropriation (I.C. § 12-20-21-4);
- (2) County Borrowing for Township Assistance (I.C. § 12-20-23);
- (3) Transmittal of appeal; determination by county commissioners on township borrowing for assistance (I.C. § 12-20-24-2);
- (4) Decision of county commissioners; further determination by county council on township borrowing for assistance (I.C. § 12-20-24-3); and
- (5) Decision of county council; notification of township board; appeal to department on township borrowing for assistance (I.C. § 12-20-24-4).²⁵⁷

The GA added I.C. § 6-1.1-18.5-21 (effective March 20, 2006) to allow a civil taxing unit to determine the property tax levy limits imposed do not apply to all or part of levies imposed to repay a rainy day loan.²⁵⁸

The GA added I.C. § 6-1.1-19-13 (effective March 20, 2006) to allow a school corporation to determine whether the property tax levy limits imposed do not apply to all or part of levies imposed to repay a rainy day loan.²⁵⁹

The GA added I.C. § 6-1.1-21.9 (effective March 24, 2006) to establish a loan from the state rainy day fund to a taxing unit whose property tax collections are affected by the bankruptcy of a taxpayer that manufactures microelectronics.²⁶⁰

The GA broadened definition of “clerk,” “fiscal body,” and “legislative body” under I.C. §§ 36-1-2-4, 36-1-2-6, and 36-1-2-9, respectively.²⁶¹

The GA added I.C. § 36-1.5-1-1 (effective March 24, 2006) evidencing intent to grant broad powers to enable political subdivisions to operate more efficiently

255. *Id.* § 82.

256. *Id.* § 83.

257. *Id.* § 84.

258. 2006 Ind. Legis. Serv. P.L. 114-2006 (H.E.A. 1124) § 1 (West).

259. *Id.* § 2.

260. *Id.* § 3.

261. 2006 Ind. Legis. Serv. P.L. 186-2006 (H.E.A. 1362) §§ 1-3 (West).

by reorganizing and cooperating.²⁶²

The GA added I.C. §§ 36-1.5-1-2, -3, -4, and -5 (effective March 24, 2006) which state that the complete authority for reorganization, cooperation, and transfer of duties between units is contained in I.C. § 36-1.5.²⁶³ This addition also provides that no law, procedure, proceedings, publications, notices, consents, approvals, or acts outside of I.C. § 36-1.5 are required for reorganization, cooperation, or transfer.²⁶⁴

The GA added I.C. § 36-1.5-1-7 (effective March 24, 2006) which states that I.C. § 36-1.5 does not prohibit reorganization, cooperation, or transfer of duties under any other statute.²⁶⁵

The GA added I.C. § 36-1.5-3 (effective March 24, 2006) which requires submission of any ordinance for resolution to DLGF.²⁶⁶ This change also requires DLGF to adjust the maximum permissible levies, rates, and budgets of reorganizing subdivisions.²⁶⁷ The GA allowed judicial review of DLGF determinations under this chapter.²⁶⁸

The GA added I.C. § 36-1.5-4 (effective March 24, 2006) which provides procedure for reorganization by referendum.²⁶⁹

The GA added I.C. § 36-1.5-5 (effective March 24, 2006) which provides procedure for cooperative agreements and transfer of responsibilities.²⁷⁰

C. Local Taxation

The GA passed legislation that allowed certain counties to use funds from CAGIT to operate and maintain jail facilities; juvenile court, detention, and probation facilities; other criminal justice facilities; and related buildings and parking facilities.²⁷¹ The only counties that meet the criteria are Elkhart and Marshall. The same legislation prevents Marshall County from using the CAGIT to pay for jail maintenance and operations once the bonds issued to pay jail construction are paid off.²⁷²

The GA extended Jackson County's authorization to impose an additional CAGIT to generate revenue for a jail and juvenile detention center until June 30, 2011.²⁷³ Scott County may impose an additional COIT of up to 0.25% to finance

262. *Id.* § 4.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. IND. CODE § 6-3.5-1.1-2.8 (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 147-2006 (S.E.A. 148) § 1 (West)).

272. *Id.*

273. *Id.* § 6-3.5-1.1-2.5 (as amended by 2006 Ind. Legis. Serv. P.L. 184-2006 (H.E.A. 1327))

construction and maintenance of criminal justice facilities.²⁷⁴

As part of the Major Moves initiative, the GA permitted eligible counties to use revenue from their EDIT to pay their contributions to the NIRDA if each county chooses to join the NIRDA.²⁷⁵ Currently, the only county meeting the criteria is LaPorte County. The same legislation requires any revenue from an increase in that county's EDIT be used first to pay those contributions.²⁷⁶

The GA extended authorization for the Nashville Food and Beverage Tax to January 1, 2012, an extension of five years.²⁷⁷ In addition, Martinsville may not initiate projects paid for using its Food and Beverage Tax after December 31, 2015, another five-year extension.²⁷⁸ Howard County may impose up to a 5% lodging tax until January 1, 2014, after which time it may not exceed 4%.²⁷⁹ Tippecanoe County must continue to pay a portion of the revenue from its innkeeper's tax to the CDC as a grant for a land lease in Prophetstown State Park through December 2012, a six-year extension.²⁸⁰

The GA authorized counties, cities, and towns that receive CEDIT to establish a local venture capital fund²⁸¹ and to cooperate with other counties, cities, or towns to form a regional venture capital fund²⁸² and to use CEDIT revenues to fund public or private entities for economic development projects.

Jasper County may increase its CAGIT rate by 0.15%, 0.20%, or 0.25% for capital expenditures related to correctional facilities and operation and maintenance of those facilities.²⁸³ Scott County may impose a rate increase in its COIT instead of increasing property taxes for the benefit of its county jail.²⁸⁴

§ 5 (West)).

274. *Id.* § 6-3.5-6-29 (as added by 2006 Ind. Legis. Serv. P.L. 184-2006 (H.E.A. 1327) § 7 (West)).

275. *Id.* § 6-3.5-7-13.1 (as amended by 2006 Ind. Legis. Serv. P.L. 47-2006 (H.E.A. 1008) § 4 (West) and 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 11 (West)).

276. *Id.*

277. *Id.* § 6-9-24-9 (as amended by 2006 Ind. Legis. Serv. P.L. 184-2006 (H.E.A. 1327) § 9 (West)).

278. *Id.* § 6-9-27-9.5 (as amended by 2006 Ind. Legis. Serv. P.L. 184-2006 (H.E.A. 1327) § 10 (West)).

279. *Id.* § 6-9-16-6 (as amended by 2006 Ind. Legis. Serv. P.L. 167-2006 (H.E.A. 1025) § 2 (West)).

280. *Id.* § 6-9-7-7 (as amended by 2006 Ind. Legis. Serv. P.L. 167-2006 (H.E.A. 1025) § 1 (West)); *see* LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT HB 1025, at 2 (2006), *available at* <http://www.in.gov/legislative/bills/2006/PDF/FISCAL/HB1025.008.pdf>.

281. IND. CODE § 6-3.5-7-13.6 (2006) (as added by 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 13 (West)).

282. *Id.* § 6-3.5-7-13.5 (as added by 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 12 (West)).

283. *Id.* § 6-3.5-1.1-2.3 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 28 (West)).

284. *Id.* § 6-3.5-6-29 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 32 (West)).

D. Income Tax

Because of the delay in calculating property tax assessments in assessment years 2002, 2003 and 2004, the GA allowed an additional deduction from Indiana personal adjusted gross income tax in 2006 if taxpayers made payments for those taxable years in 2005 and did not previously deduct them in an earlier year. The allowable deduction for each assessment year remained at \$2500.²⁸⁵

The GA expanded the Indiana airport development zone income tax credit to include Delaware County.²⁸⁶ The GA also decreased the minimum expenditure requirements for an airport zone in Vanderburgh County to the same levels as required in other counties with airport zones (except Marion County) and removed the maximum size limitation that applied only to Vanderburgh County.²⁸⁷

The GA incorporated the IRC as it was in effect on January 1, 2006.²⁸⁸ This update incorporates the changes made by the Energy Tax Incentives Act of 2005, the Katrina Emergency Tax Relief Act of 2005, and the Gulf Opportunity Zone Act of 2005.²⁸⁹ However, the GA limited the additional \$1500 personal exemption for dependents to those defined in I.C. § 6-3-1-1.5(c)(1)(B) as it was in effect on January 1, 2004.²⁹⁰ That definition referred to a child under age 19 or a student under age 24. By incorporating the 2004 definition, the GA ignores the new federal distinction between qualifying children and qualifying relatives as dependents.²⁹¹

The apportionment formula used to calculate the Indiana corporate adjusted gross income tax will change to a single sales factor over the next five years by shifting 10% each year from the combined property and payroll factors (currently 50%) to the sales factor (also currently 50%).²⁹² The new apportionment formula will be fully effective beginning in 2011.²⁹³ Beginning in 2007, personal

285. 2006 Ind. Legis. Serv. P.L. 67-2006 (S.E.A. 355) § 22 (West).

286. IND. CODE § 8-22-3.5-1(6) (2006) (as added by 2006 Ind. Legis. Serv. P.L. 124-2006 (S.E.A. 382) § 1 (West)); *see* LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT SB382, at 3 (2006) [hereinafter FISCAL IMPACT STATEMENT 382], *available at* <http://www.in.gov/legislative/bills/2006/PDF/FISCAL/SBO382.007.pdf>.

287. IND. CODE § 8-22-3.5-3 (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 124-2006 (S.E.A. 382) § 4 (West)); *see* FISCAL IMPACT STATEMENT 382, *supra* note 286, at 2.

288. IND. CODE § 6-3-1-11 (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 184-2006 (H.E.A. 1327) § 4 (West)).

289. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT HB 1327, at 3 (2006), *available at* <http://www.in.gov/legislative/bills/2006/PDF/FISCAL/HB 1327.009.pdf>.

290. IND. CODE § 6-3-1-1.5 (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 184-2006 (H.E.A. 1327) § 3 (West)).

291. *See* IRC § 152 (2000).

292. IND. CODE § 6-3-2-2 (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 25 (West)).

293. *Id.*

property that is delivered or shipped to a purchaser in Indiana is considered a sale in Indiana, regardless of the f.o.b. point or other conditions of the sale.²⁹⁴

For taxable years beginning after June 30, 2006, a corporation is required to add back deductions taken on its federal income tax return for intangible expenses or directly related intangible interest expenses incurred in transactions with related parties.²⁹⁵ A taxpayer filing a combined return must petition the DOR within 30 days after the end of its tax year to discontinue filing a combined tax return.²⁹⁶

The GA now permits a taxpayer to take a credit against Indiana personal adjusted gross income tax for contributions made to a College Choice 529 Education Savings Plan, effective January 1, 2007.²⁹⁷ The non-refundable credit is equal to the lesser of 20% of the contribution made during the taxable year or \$1000.²⁹⁸ Also, effective July 1, 2006, the Neighborhood Assistance tax credit is no longer available directly to individuals who provide community services.²⁹⁹ Instead, it is available to taxpayers who contribute to neighborhood organizations that provide community services in economically disadvantaged areas or to economically disadvantaged households.³⁰⁰

E. Inheritance Tax

The GA took no substantive action in this area.

F. Sales and Use Tax

Indiana is a full member of the Streamlined Sales and Use Tax ("SST") Agreement. Thus, the GA made a number of changes to Indiana sales tax law to harmonize the law with the SST Agreement. First, effective July 1, 2006, the term "direct mail" is defined as printed material (including accompanying tangible personal property) that is delivered to a mass audience or to addresses on a mailing list for which the recipient is not charged.³⁰¹ The term already appeared in the sales tax law, but had not been defined.³⁰² Also effective July 1,

294. *Id.*

295. *Id.* § 6-3-1-3.5(b)(9) (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 24 (West)).

296. *Id.* § 6-3-2-2.

297. *Id.* § 6-3-3-12 (as added by 2006 Ind. Legis. Serv. P.L. 192-2006 (H.E.A. 1029) § 4 (West)).

298. *Id.*

299. *Id.* § 6-3.1-9-2 (as amended by 2006 Ind. Legis. Serv. P.L. 181-2006 (H.E.A. 1261) § 45 (West)).

300. *Id.* § 6-3.1-9-1 (as amended by 2006 Ind. Legis. Serv. P.L. 181-2006 (H.E.A. 1261) § 44 (West)).

301. *Id.* § 6-2.5-1-6.5 (as added by 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 2 (West)).

302. *See id.* § 6-2.5-13-3 (regarding sourcing of purchases of direct mail).

2006, the term “food and food ingredients” does not include tobacco products.³⁰³ For retail transactions occurring after December 31, 2007, the definition of “bundled transactions” removes several categories of transactions from sales tax.³⁰⁴ Specifically, the following types of bundled transactions are no longer subject to sales tax: (1) A bundled transaction in which the price of the product varies according to selections made by the purchaser;³⁰⁵ (2) A bundled transaction in which the service is the main focus of the transaction and any tangible personal property is provided only because it is necessary to use of the service;³⁰⁶ (3) A bundled transaction that combines taxable and exempt products and the taxable products make up between 10% and 50% of the total purchase price.³⁰⁷ In addition, taking effect for retail transactions occurring after December 31, 2007, a retail merchant makes a retail transaction when the merchant sells tangible personal property in a bundled transaction.³⁰⁸

The GA amended a sales tax exemption that had been repealed in 2004 but reestablished in 2005.³⁰⁹ The new statute exempts sales of cargo trailers and recreational vehicles to nonresident purchasers if they take the trailer or vehicle out of the state within 30 days of purchase and register it in a state that allows a reciprocal “drive-away” exemption for Indiana residents.³¹⁰ If the other state does not allow a reciprocal exemption, sales of cargo trailers and recreational vehicles are subject to Indiana sales tax.³¹¹ A non-resident purchaser is no longer required to provide a copy of the out-of-state registration to the seller but must affirm, under penalties of perjury, that the trailer or vehicle will be registered out of state. The DOR is required to provide the information necessary to determine a purchaser’s eligibility for the exemption claimed to retail merchants in the business of selling cargo trailers and RVs.³¹²

303. *Id.* § 6-25-1-20 (as amended by 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 3 (West)).

304. *See* LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT SB258, at 2 (2006), *available at* <http://www.in.gov/legislative/bills/2006/PDF/FISCAL/SBO258.008.pdf>.

305. IND. CODE § 6-2.5-1-11.5(c) (2006) (as added by 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 1 (West)).

306. *Id.* § 6-2.5-1-11.5(d)(1) (as added by 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 1 (West)).

307. *Id.* § 6-2.5-1-11.5(d)(3) (as added by 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 1 (West)). Combination transactions in which the taxable products made up less than 10% of the total purchase price were already exempt from sales tax. *See id.* § 6-2.5-1-11.5(d)(2) (as added by 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 1 (West)).

308. *Id.* § 6-2.5-4-15 (as added by 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 4 (West)).

309. 2006 Ind. Legis. Serv. P.L. 81-2004 (H.E.A. 1365) (West); 2005 Ind. Legis. Serv. P.L. 195-2005 (S.E.A. 213) (West).

310. IND. CODE § 6-2.5-5-39(c)(5) (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 92-2006 (S.E.A. 106) § 1 (West)).

311. *Id.*

312. *Id.* § 6-2.5-5-39(d)-(e) (as amended by 2006 Ind. Legis. Serv. P.L. 92-2006 (S.E.A. 106)

Indiana retail merchants will now have to renew their merchant's certificate every two years instead of holding a perpetual certificate.³¹³ The DOR must renew certificates within 30 days after expiration at no charge if the retail merchant has filed all Indiana Sales and Use Tax returns and paid all taxes.³¹⁴ However, the DOR may not renew the certificate of a merchant who has failed to remit Sales and Use Taxes.³¹⁵ The statute provides that the DOR must notify a delinquent retail merchant that it will not renew the merchant's certificate at least 60 days prior to the certificate's expiration date.³¹⁶ Certificates originally issued before December 1, 2006, expired on December 31, 2006.³¹⁷ Certificates originally issued after November 30, 2006, and before January 1, 2007, will expire on December 31, 2008.³¹⁸ However, the DOR may delay the expiration date for existing certificates for up to one year to cope more effectively with the increased workload.³¹⁹

The GA added a deduction from Indiana sales tax for the retail sale of E85 fuel. The deduction is equivalent to \$0.10 per gallon of E85 sold during reporting periods from July 1, 2006, and July 1, 2008.³²⁰ The maximum aggregate deduction for all merchants claiming the deduction for sales of E85 is \$2 million.³²¹ If the DOR determines that the amount of deductions allowed will exceed the cap, the DOR is required to publish in the Indiana Register a notice that the deduction is terminated after the date specified in the notice and that no additional deductions will be granted for transactions occurring after the date in the notice.³²²

For transactions occurring after January 1, 2007, an entity may not assign its sales tax remittance deduction to a non-affiliated entity.³²³ The statute generally

§ 1 (West)).

313. *Id.* § 6-2.5-8-1(f) (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 1 (West)); *see also id.* § 6-2.5-8-5 (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 1 (West)).

314. *Id.* § 6-2.5-8-1(f) (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 1 (West)).

315. *Id.* § 6-2.5-8-1(g) (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 1 (West)).

316. *Id.*

317. 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 12 (West).

318. *Id.*

319. *Id.*

320. IND. CODE § 6-2.5-7-5(5)(c) (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 122-2006 (S.E.A. 353) § 3 (West)).

321. *Id.* § 6-2.5-7-5(5)(d) (as amended by 2006 Ind. Legis. Serv. P.L. 122-2006 (S.E.A. 353) § 3 (West)).

322. *Id.*

323. *Id.* § 6-2.5-6-9(c) (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 23 (West) and 2006 Ind. Legis. Serv. P.L. 184-2006 (H.E.A. 1327) § 2 (West)).

uses the IRS definition of related taxpayers³²⁴ and an affiliated group³²⁵ except that it changes the required percentage of control from 80% to 50%.³²⁶ The exception also applies to two or more partnerships that have the same degree of ownership as the affiliated group.³²⁷

The motion picture industry is entitled to an exemption from sales tax for purchases of tangible personal property that the purchaser will directly use in the production of a motion picture in Indiana as long as the purchase occurs between January 1, 2007, and December 31, 2008.³²⁸ Qualifying motion picture productions include feature length films, short features, independent or studio productions, documentaries, and television programs but do not include obscene motion pictures or television coverage of news or athletic events.³²⁹ Pre-production, production and post-production activities qualify for the exemption, but personnel transportation, food and beverage service, lodging, and packaging materials do not qualify.³³⁰

The GA imposed a new excise tax called the Indiana utility services use tax on retail consumption of utility services in Indiana that are billed after June 30, 2006.³³¹ This tax complements the existing utility receipts. The utility services use tax is imposed at the same rate as the utility receipts tax³³²—currently 1.4%.³³³ The person who consumes the utility services in Indiana is responsible for the utility services use tax,³³⁴ although sellers of such services may register with the DOR to collect and remit the taxes on behalf of the consumers.³³⁵ Utility services are exempt from the utility services use tax if they were subject to the utility services receipt tax.³³⁶ In addition, the utility services use tax is not imposed on the portion of the transaction that was excluded, exempt, or subject to a deduction from the utility services receipt tax.³³⁷ A taxpayer may take a

324. I.R.C. § 267(b)(11) (2000).

325. *Id.* § 1504.

326. IND. CODE § 6-2.5-6-9(c) (2006).

327. *Id.*

328. *Id.* § 6-2.5-5-41 (as added by 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 3 (West)).

329. *Id.*

330. *Id.*

331. *Id.* § 6-2.3-5.5-1 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 19 (West)).

332. *Id.* § 6-2.3-5.5-3 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 19 (West)).

333. *Id.* § 6-2.3-2-2.

334. *Id.* § 6-2.3-5.5-6 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 19 (West)).

335. *Id.* § 6-2.3-5.5-8 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 19 (West)).

336. *Id.* § 6-2.3-5.5-4 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 19 (West)).

337. *Id.*

credit against the utility services use tax for any utility services use tax paid to another state, but not for payment of general sales tax, purchase tax, or use tax.³³⁸

Related to the Major Moves projects, operators who purchase tangible personal property for incorporation into or improvement of a tollway or other public-private agreement project are entitled to the construction exemption from sales and use taxes.³³⁹

Effective July 1, 2006, a person who manufactures, fabricates, or assembles tangible personal property from materials either within or outside Indiana and who uses, stores, distributes, or consumes tangible personal property in Indiana is subject to the Indiana use tax.³⁴⁰

The GA exempted home energy transactions that occur between July 1, 2006, and June 30, 2007, from Indiana sales tax if the person acquiring the home energy does so through a home energy assistance program.³⁴¹ Further, the power subsidiary or public utility providing the home energy in such a transaction is not considered a retail merchant.³⁴²

G. Tax Procedure

The DOR may require that a withholding agent make periodic deposits accompanied by an informational return if the DOR finds that the agent is not withholding, reporting, or remitting income taxes.³⁴³

The GA tightened the restrictions on the amount of time a person has to respond to a variety of DOR actions. A person now has to pay an assessment or file a written protest within 45 days (rather than 60 days) after the DOR mails a notice of proposed assessment.³⁴⁴ A taxpayer has to appeal a DOR decision made in a letter of finding within 60 days (rather than 180 days) after the date the DOR issued the letter of finding if the taxpayer does not request a rehearing or from the date that the DOR denied the taxpayer's request for a rehearing. A letter of findings must also now include a supplemental letter of findings.³⁴⁵

338. *Id.* § 6-2.3-5.5-5 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 19 (West)).

339. IND. CODE § 8-15-3-23 (2004) (as amended by 2006 Ind. Legis. Serv. P.L. 47-2006 (H.E.A. 1008) § 31 (West)).

340. IND. CODE § 6-2.5-3-2(d) (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 20 (West)).

341. *Id.* § 6-2.5-5-16.5 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 22 (West)).

342. *Id.* § 6-2.5-4-5 (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 21 (West)).

343. *Id.* § 6-3-4-8.1(c) (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 3 (West)).

344. *Id.* § 6-8.1-5-1(d) (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 4 (West)).

345. *Id.* § 6-8.1-5-1(h) (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 4 (West)).

Interest accrues on excess tax payments that are not refunded or applied to current or future tax liabilities from the date that the taxpayer files a claim for refund.³⁴⁶

The GA changed the procedure used by a public utility company to challenge the DLGF's distributable property assessment to the BTR. A public utility company has 10 days after receiving notice of the DLGF's tentative assessment to request a preliminary conference (rather than a formal hearing) with the DLGF.³⁴⁷ The DLGF has the option to hold a conference.³⁴⁸ A public utility company can appeal a final decision to the BTR, even if it did not object to the tentative assessment.³⁴⁹

Effective January 1, 2006, if an assessor discovers an error indicating that the taxpayer over-reported the assessment then the assessor must adjust the assessment to correct the error and process a refund or credit for any overpayment.³⁵⁰ Changes cannot be made to reward unclaimed exemptions.³⁵¹

Applications for exemptions from property tax that must accompany a personal property tax return must be filed no more than 30 days after the filing date for the personal property return, whether or not the filing date was extended.³⁵²

The GA gave authority to designating bodies to waive clerical and mathematical errors in tax abatement forms and noncompliance with filing dates.³⁵³

All members of a class in a class action suit against the DLGF must have complied with applicable statutory requirements before certification of the class.³⁵⁴

County auditors may adjust the certified assessed value for a taxing unit that is used in setting the tax rates in the following year in order to account for the anticipated effect of outstanding appeals regarding that assess value.³⁵⁵ The

346. *Id.* § 6-8.1-9-2(2)(c) (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 10 (West)).

347. *Id.* § 6-1.1-8-28 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 5 (West)).

348. *Id.* § 6-1.1-8-29 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 6 (West)).

349. *Id.* §§ 6-1.1-8-28 and -30 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) §§ 5, 7 (West)).

350. *Id.* § 6-1.1-9-10 (as added by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 9 (West)).

351. *Id.*

352. *Id.* § 6-1.1-11-13 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 10 (West)).

353. *Id.* § 6-1.1-12.1-9.5 (as added by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 33 (West)).

354. *Id.* § 6-1.1-15-15 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 40 (West)).

355. *Id.* § 6-1.1-17-0.5 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) §

reduction may not exceed the lesser of 2% of the assessable property in the taxing unit or the amount of any reduction in the previous year that resulted from successful appeals.³⁵⁶ A county auditor may request approval from the DLGF for a larger reduction amount.³⁵⁷

The DLGF need no longer include instructions on how to calculate depreciation of real property or replacement cost of improvements in its rules.³⁵⁸ In addition, the BTR need no longer provide notice of its final determinations directly to the affected taxing units.³⁵⁹ Instead, the county auditor must notify the taxing units. In addition, the DLGF is no longer required to include cost and depreciation tables in the real property rule promulgated for a general reassessment.³⁶⁰

If the BTR fails to hold a hearing on a petition within the maximum allowed time, that failure does not constitute a final determination.³⁶¹ If the BTR does not hold a hearing or fails to issue a final determination, the petitioner may wait for the board to act or may request judicial review.³⁶² If the petitioner initiates a judicial proceeding and the BTR has not issued a determination, the Tax Court will hear the matter *de novo*.³⁶³

Local officials who are defendants in actions concerning original determinations that they made may, with written approval from the Indiana Attorney General, hire a private attorney (at local expense) to represent them before the Tax Court.³⁶⁴

H. Tax Collection

A county sheriff may no longer release a judgment arising from a tax warrant once the judgment is paid in full. Only the DOR may release such judgments.³⁶⁵

41 (West)).

356. *Id.*

357. *Id.* § 6-1.1-17-8.5 (as added by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 43 (West)).

358. *Id.* § 6-1.1-31-6 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 52 (West)).

359. *Id.* § 6-1.1-15-4 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 39 (West)); *id.* § 6-1.5-5-2 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 62 (West)).

360. *Id.* § 6-1.1-15-4; *id.* § 6-1.5-5-5 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 63 (West)).

361. *Id.* § 6-1.5-5-6 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 64 (West)).

362. *Id.*

363. *Id.*

364. *Id.* § 33-26-7-1 (as amended by 2006 Ind. Legis. Serv. P.L. 154-2006 (S.E.A. 260) § 70 (West)).

365. *Id.* § 6-8.1-8-2(g) & (l) (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 6 (West)).

A county sheriff may only continue collection activity on a tax warrant for more than 120 days if the DOR determines that the sheriff is collecting the warrant on a schedule that will result in the judgment being paid within one year and, new with this legislation, if the sheriff's tax warrant database is compatible with the DOR's database.³⁶⁶

The DOR may levy on unclaimed property if the apparent owner of the property is subject to a tax warrant.³⁶⁷ The commissioner of the DOR may determine that an outstanding liability for taxes, interest, penalties, collection fees, sheriff's costs, clerk's costs, or fees in uncollectible but any judgment lien on those amounts survives such determination.³⁶⁸

The GA made a number of changes to the provisions regarding tax sales. The price of property sold at a tax sale now includes the greater of \$25 or the amount of postage and publication costs.³⁶⁹ A county treasurer or county executive may certify to the county auditor a list of real property eligible for sale 51 days after the tax payment due date.³⁷⁰ Property may be certified as eligible for sale after the fall tax installment if the county treasurer or county executive certifies that the property is vacant or abandoned. In the case of real property that is vacant or abandoned, the county executive must certify that fact to the county auditor not later than 61 days before the earliest date on which application for judgment and order for sale may be made.³⁷¹ This property must be offered in a different phase or day of a tax sale than other property.³⁷² A property may not be offered for sale more than 171 days after the date it is certified to the county auditor.³⁷³ Persons who have violated the unsafe building law may not bid on property offered at a tax sale unless they are the owner of the property.³⁷⁴ A purchase made by an ineligible bidder is subject to forfeiture if the bidder does not cure the circumstances that created the ineligibility.³⁷⁵ A second tax sale is no longer allowed.³⁷⁶ Property not sold at the first tax sale will be transferred to

366. *Id.* § 6-8.1-8-3(d) (as amended by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 7 (West)).

367. *Id.* § 6-8.1-8-15 (as added by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 9 (West)).

368. *Id.* § 6-8.1-8-14 (as added by 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 8 (West)).

369. *Id.* § 6-1.1-24-2 (as amended by 2006 Ind. Legis. Serv. P.L. 169-2006 (H.E.A. 1102) § 15 (West)).

370. *Id.* § 6-1.1-24-1 (as amended by 2006 Ind. Legis. Serv. P.L. 169-2006 (H.E.A. 1102) § 13 (West)).

371. *Id.*

372. *Id.* § 6-1.1-24-5 (as amended by 2006 Ind. Legis. Serv. P.L. 169-2006 (H.E.A. 1102) § 21 (West)).

373. *Id.*

374. *Id.* § 6-1.1-24-5.3 (as amended by 2006 Ind. Legis. Serv. P.L. 169-2006 (H.E.A. 1102) § 22 (West)).

375. *Id.*

376. *Id.* § 6-1.1-24-6 (as amended by 2006 Ind. Legis. Serv. P.L. 169-2006 (H.E.A. 1102) §

the county executive who may choose to transfer the property to a nonprofit organization to be used for the public good.³⁷⁷ A county executive or MDC may hold, manage, develop, repair, maintain, improve, lease or enter into contracts to accomplish any of those functions for properties that did not sell for the minimum bid.³⁷⁸

I. Miscellaneous

The GA changed the date of automatic validation to bonds and other obligations previously issued by government entities from March 15, 2000, to March 15, 2006.³⁷⁹

Counties and municipalities may now fund emergency warning systems using the Barrett Law.³⁸⁰

The GA made a number of changes regarding Indiana motor fuels tax. The \$0.01 per gallon tax credit for retail sale of blended biodiesel is available until December 31, 2010, instead of December 31, 2006.³⁸¹ The maximum credit available for ethanol production, biodiesel production and biodiesel blending is now \$50 million instead of \$20 million.³⁸² Finally, the GA extended the tax credit for integrated coal gasification power plants to investments in fluidized combustion bed technologies.³⁸³

The GA relaxed the requirements and extended deadlines for several tax credits. For applications filed after March 31, 2006, the EDGE credit is available to employers with at least 35 employees (down from 75) in Indiana.³⁸⁴ The wage criteria for determining eligibility for the EDGE credit are modified, but not substantively.³⁸⁵ Awards of the EDGE credit are capped at \$10 million for fiscal

23 (West)).

377. *Id.* § 6-1.1-24-6.7 (as amended by 2006 Ind. Legis. Serv. P.L. 169-2006 (H.E.A. 1102) § 26 (West)).

378. *Id.* § 6-1.1-25-9 (as amended by 2006 Ind. Legis. Serv. P.L. 169-2006 (H.E.A. 1102) § 31 (West)).

379. IND. CODE § 5-1-1-1 (2005) (as amended by 2006 Ind. Legis. Serv. P.L. 184-2006 (H.E.A. 1327) § 1 (West)).

380. IND. CODE §§ 36-9-36-2, -37-11, -38-2 (2004) (as amended by 2006 Ind. Legis. Serv. P.L. 42-2006 (H.E.A. 1107) § 1 (West)).

381. IND. CODE § 6-3.1-27-10(d) (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 122-2006 (S.E.A. 353) § 8 (West)).

382. *Id.* § 6-3.1-27-9.5 (as amended by 2006 Ind. Legis. Serv. P.L. 122-2006 (S.E.A. 353) § 7 (West)).

383. *Id.* § 6-3.1-29-15 (as amended by 2006 Ind. Legis. Serv. P.L. 122-2006 (S.E.A. 353) § 13 (West)).

384. *Id.* § 6-3.1-13-15.5 (as amended by 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 4 (West)).

385. *Id.* The company must pay the greater of 105% of the average wages paid by companies in the same industry and county, or 105% of the average wages paid by companies in the same industry within Indiana, or 200% of minimum wage. *Id.*

years 2006 and following, up from \$5 million.³⁸⁶ The Headquarters Relocation Credit is available for taxable years beginning after 2005³⁸⁷ for companies that have at least \$100 million in annual worldwide revenues (down from \$500 million) for the previous year³⁸⁸ and that employ at least 75 people in Indiana.³⁸⁹ The deadline for making a qualifying investment for the Hoosier Investment Credit is now January 1, 2012, instead of January 1, 2008.³⁹⁰

The GA limits the use of students and teachers in promoting a bond issue and prevents professionals who provide services to a project from promoting a bond issue for that project.³⁹¹ The GA also defines standards for determining the validity of signatures on a remonstrance petition.³⁹²

Motorboats that are registered in another state are not required to be registered or titled in Indiana if the owner pays the boat excise tax and certain fees, including a new \$2 fee paid to the BMV.³⁹³

J. Other Miscellaneous Tax Legislation

1. *Utility Tax.*—I.C. § 6-2.3-3-11 (effective July 1, 2006) was added to the utility receipts tax to provide that furnishing utility services to an end user in Indiana, whether or not the utility services are delivered through the pipelines, transmission lines, or property of another person and the taxpayer providing the utility service is or is not a resident of Indiana, or transaction is subject to a deduction under the mobile telecommunications sourcing act.³⁹⁴

I.C. § 6-2.3-5.5 (effective July 1, 2006) was added to impose the utility services use tax on the consumption of utility services that are billed after June 30, 2006.³⁹⁵ The tax is measured by the gross consideration received by the seller from the sale of the utility services, and is imposed at the rate of 1.4%.³⁹⁶

I.C. § 6-2.3-5.5-4 (effective July 1, 2006) was added to provide an exemption from the utility services use tax if the transaction is subject to the utility receipts

386. *Id.*

387. 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 17 (West).

388. IND. CODE § 6-3.1-30-2 (2006) (as amended by 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 8 (West)).

389. *Id.* § 6-3.1-30-8 (as amended by 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 9 (West)).

390. *Id.* § 6-3.1-26-26 (as amended by 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 7 (West)).

391. *Id.* § 6-1.1-20-10 (as amended by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 5 (West)).

392. *Id.* § 6-1.1-20-11 (as added by 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 6 (West)).

393. *Id.* §§ 6-6-11-13; IND. CODE §§ 9-29-15-9, 9-31-3-2 (2004) (as amended by 2006 Ind. Legis. Serv. P.L. 46-2006 (H.E.A. 1331) § 1 (West)).

394. 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 18 (West).

395. 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 19 (West).

396. *Id.*

tax, the gross receipts from the transaction are not taxable under the utility receipts tax, the services are consumed for an exempt purpose under the utility receipts tax, or the services were consumed for the purpose for which a deduction is granted.³⁹⁷

I.C. § 6-2.3-5.5-5 (effective July 1, 2006) entitles a person to a credit against the utility services use tax imposed on the retail consumption of utility services equal to the amount of utility services use tax paid to another state.³⁹⁸

I.C. § 6-2.3-5.5-7 (effective July 1, 2006) provides that the DOR shall establish procedures for the collection of the utility services use tax from users, including deposit and reporting requirements.³⁹⁹ Failure of a person to comply with the procedures is subject to the penalties imposed under I.C. § 6-8.1.⁴⁰⁰

I.C. §§ 6-2.3-5.5-8 to -10 (effective July 1, 2006) state that any seller of utility services may elect to register with the DOR to collect utility services use tax on behalf of persons liable for the tax imposed.⁴⁰¹ The person will pay the tax to the registered seller and the seller will collect the tax as an agent for the state.⁴⁰² The seller upon request of the consumer will issue a receipt to the consumer for the tax collected.⁴⁰³ In all other cases, the person liable for the tax shall pay the tax directly to the DOR.⁴⁰⁴

I.C. § 6-2.3-5.5-11 (effective July 1, 2006) provides that if the DOR assesses the tax against a person for the person's consumption of utility services, and the person has already paid the tax to the seller, the person may avoid the tax if the person can produce a receipt or other evidence that the person paid the tax to the seller.⁴⁰⁵

2. *Sales and Use Tax.*—I.C. § 6-2.5-4-5 (effective July 1, 2006) was amended to provide that a business located in a county where the Crane military base is located will be considered to be a military base enhancement area and can receive a sales tax exemption for utility services.⁴⁰⁶

I.C. § 6-2.5-4-15 (effective July 1, 2006) was added to provide that a bundled transaction is a retail transaction for transactions occurring after December 31, 2007.⁴⁰⁷

I.C. § 6-2.5-5-16.5 (effective July 1, 2006) was added to provide that home energy assistance is exempt from the sales tax if the person acquiring the home energy acquires it after June 30, 2006 and before July 1, 2007.⁴⁰⁸

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.* § 21.

407. 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 4 (West).

408. 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 22 (West).

I.C. § 6-2.5-6-1 (effective July 1, 2006) was amended to provide that a Model 4 seller whose annual sales tax liability is less than \$1000 only has to file and remit on one annual return.⁴⁰⁹

I.C. § 6-2.5-6-9 (effective January 1, 2007) is amended to provide that the sales tax bad debt deduction is not assignable unless the individual or entity is part of the same affiliated group as defined in Section 1504(a)(2) of the IRC (except that the ownership percentage shall be determined using 50% instead of 80%).⁴¹⁰ The exception also applies to two or more partnerships that have the same degree of ownership as the affiliated group.⁴¹¹

I.C. § 6-2.5-6-11 (effective July 1, 2006) was amended to provide that a utility or other person who extends assistance to a heating assistance program may deduct from the retail merchant's sales tax payment an amount equal to the amount of assistance that was extended by the retail merchant to the heating assistance program.⁴¹²

I.C. § 6-2.5-7-1 (effective July 1, 2006) was amended to change the definition of prepayment rate for calculating the sales tax on gasoline.⁴¹³

I.C. § 6-2.5-7-14 (effective July 1, 2006) was amended to provide that the prepayment rate used in determining prepayment amounts of sales tax on gasoline may not exceed 125% of the prepayment rate used for the previous six month period.⁴¹⁴

I.C. § 6-2.5-13-1 (effective July 1, 2006) was amended to provide that floral orders transmitted to another florist for delivery will be sourced to the florist that took the original order until January 1, 2008.⁴¹⁵

3. *Adjusted Gross Income Tax.*—I.C. § 6-3-2-1.5 (effective July 1, 2006) was amended to provide that a corporation located in a county where the Crane military base is located is to be taxed on its income at a rate of 5% instead of 8.5%.⁴¹⁶

I.C. § 6-3-2-20 (effective July 1, 2006) was added to establish the guidelines and requirements for a taxpayer to add back the amount of any intangible expenses or directly related intangible interest expenses to the taxpayer's taxable income.⁴¹⁷

4. *Income Tax Credits.*—I.C. § 6-3.1-11.6-9 (effective July 1, 2006) was amended to provide that a business located in a county where the Crane military base is located is eligible for the military base investment cost tax credit.⁴¹⁸

I.C. § 6-3.1-27-8 (effective upon passage) and I.C. § 6-3.1-27-9 (effective

409. 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 5 (West).

410. 2006 Ind. Legis. Serv. P.L. 162-2006 (S.E.A. 258) § 23 (West).

411. *Id.*

412. 2006 Ind. Legis. Serv. P.L. 181-2006 (H.E.A. 1261) § 43 (West).

413. 2006 Ind. Legis. Serv. P.L. 122-2006 (S.E.A. 353) § 2 (West).

414. 2006 Ind. Legis. Serv. P.L. 176-2006 (H.E.A. 1214) § 2 (West).

415. 2006 Ind. Legis. Serv. P.L. 153-2006 (S.E.A. 258) § 6 (West).

416. 2006 Ind. Legis. Serv. P.L. 180-2006 (H.E.A. 1259) § 4 (West).

417. 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 26 (West).

418. 2006 Ind. Legis. Serv. P.L. 180-2006 (H.E.A. 1259) § 5 (West).

January 1, 2006) are amended to imply that the credit awarded by the EDC for biodiesel production and the credit for blending biodiesel can be awarded at an amount that is less than the statutory limit.⁴¹⁹

I.C. § 6-3.1-28-11 (upon passage) was amended to imply that the credit awarded by the EDC for ethanol production can be awarded at an amount that is less than the statutory limit.⁴²⁰ Increases the maximum amount of credits allowed for an ethanol production plant from \$3 million to \$2 million if the production is less than 60,000,000 gallons in a taxable year or \$3 million if the production is greater than 60,000,000 gallons in a taxable year.⁴²¹

I.C. § 6-3.1-29-15 (effective January 1, 2006) was amended to provide that an entity is qualified for the coal gasification income tax credit if the facility is dedicated to primarily serving Indiana retail electric utility consumers.⁴²² This section also provides that the fluidized bed combustion technology tax credit is 7% of the taxpayer's qualified investment for the first \$500 million invested, and 3% of the qualified taxpayer's investment that exceeds \$500 million.⁴²³

I.C. § 6-3.1-30-2 (effective January 1, 2006) was amended to provide that for a business to qualify for the headquarters relocation tax credit, the annual worldwide revenues had to be at least \$100 million (prior provision was \$500 million).⁴²⁴

I.C. § 6-3.1-30-8 (effective January 1, 2006) was amended to provide that a business must have at least 75 employees in Indiana to qualify for the headquarters relocation tax credit.⁴²⁵

5. *County Economic Development Income Tax.*—I.C. § 6-3.5-7-26 (upon passage) was amended to provide that a county has until June 1, 2006 (instead of April 1, 2006) to adopt an ordinance to impose an additional CEDIT rate to offset the effects of the elimination of the property tax on inventory.⁴²⁶

6. *Motor Fuel Tax.*—I.C. § 6-6-1.1-103 (effective January 1, 2006) was amended to define E85 as a fuel blend nominally consisting of 85% ethanol and 15% gasoline.⁴²⁷

I.C. § 6-6-1.1-515 (effective July 1, 2006) was added to provide that the administrator of the special tax division may require all reports required to be filed concerning the gasoline tax must be filed in an electronic format prescribed by the administrator.⁴²⁸

I.C. § 6-6-2.5-1 (effective July 1, 2006) was amended to provide that

419. 2006 Ind. Legis. Serv. P.L. 122-2006 (S.E.A. 353) §§ 5-6 (West).

420. *Id.* § 9.

421. *Id.*

422. *Id.* § 13.

423. *Id.*

424. 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 8 (West).

425. *Id.* § 9.

426. 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 34 (West).

427. 2006 Ind. Legis. Serv. P.L. 122-2006 (S.E.A. 353) § 18 (West).

428. 2006 Ind. Legis. Serv. P.L. 176-2006 (H.E.A. 1214) § 3 (West).

biodiesel and blended biodiesel are not alternative fuels.⁴²⁹

I.C. § 6-6-2.5-1.5 (effective July 1, 2006) was amended to define biodiesel as a renewable, biodegradable, mono alkyl ester combustible liquid fuel derived from agricultural plant oils or animal fats that meets American Society for Testing and Materials specifications D6751-03a Standard Specification for Biodiesel Fuel (B100) Blend Stock for Distillate Fuels, as well as other fuels of the same derivation capable of use in the generation of power for the propulsion of a motor vehicle, airplane or motorboat.⁴³⁰ This section also defined blended biodiesel to be a blend of biodiesel with petroleum diesel fuel so that the volume percentage of biodiesel in the blend is at least 2%.⁴³¹

I.C. § 6-6-2.5-3 (effective July 1, 2006) was amended so that the term blending does not include biodiesel or blended biodiesel.⁴³²

I.C. § 6-6-2.5-22 (effective July 1, 2006) was amended so that biodiesel and blended biodiesel are included in the definition of special fuel.⁴³³

I.C. § 6-6-2.5-72 (effective July 1, 2006) was added to provide that the administrator may require special fuel tax reports to be filed in an electronic format.⁴³⁴

I.C. § 6-6-4.1-4.8 (effective July 1, 2006) was amended to provide that in order to claim a proportional use credit for motor carrier fuel use taxes, the claim for the credit must be filed by the due date of the quarterly return for which the credit is being claimed.⁴³⁵

7. *Tax Administration.*—I.C. § 6-8.1-1-1 (effective July 1, 2006) was amended so that the utility services use tax is considered a listed tax-for tax administration purposes.⁴³⁶

I.C. § 6-8.1-3-18 (effective July 1, 2006) was repealed.⁴³⁷ The section gave DOR employees full police powers to enforce the charity gaming statutes.⁴³⁸

I.C. § 6-8.1-4-4 (effective July 1, 2006) was amended to give the commissioner of the DOR the authority to deny any applications submitted by an operator of a commercial motor vehicle if the person has failed to file all returns and pay all taxes.⁴³⁹

I.C. § 6-8.1-8-2 (effective January 1, 2007) was amended to require the DOR to state on a demand notice the statutory authority for the DOR to levy against

429. 2006 Ind. Legis. Serv. P.L. 122-2006 (S.E.A. 353) § 19 (West).

430. *Id.* § 20.

431. *Id.*

432. *Id.* § 21.

433. *Id.* § 22.

434. 2006 Ind. Legis. Serv. P.L. 176-2006 (H.E.A. 1214) § 4 (West).

435. *Id.* § 5.

436. 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 35 (West).

437. 2006 Ind. Legis. Serv. P.L. 91-2006 (S.E.A. 100) § 15 (West).

438. IND. CODE § 6-8.1-3-18 (2006), *repealed by* 2006 Ind. Legis. Serv. P.L. 91-2006 (S.E.A. 100) § 15 (West).

439. 2006 Ind. Legis. Serv. P.L. 176-2006 (H.E.A. 1214) § 6 (West).

a taxpayer's property held by a financial institution.⁴⁴⁰ The amendment also provides that the sheriff in a county where a warrant has been filed does not have the authority to release the warrant.⁴⁴¹

I.C. § 6-8.1-8-3 (effective January 1, 2007) was amended to require a county sheriff to return a tax warrant to the DOR even if a payment plan is established by the sheriff, unless the sheriff's electronic data base regarding tax warrants is compatible with the DOR's data base.⁴⁴²

I.C. § 6-8.1-8-14 (effective January 1, 2007) was added to allow the commissioner to declare an outstanding liability as uncollectible.⁴⁴³ However, any lien created by the outstanding liability remains in place.⁴⁴⁴

I.C. § 6-8.1-8-15 (effective January 1, 2007) was added to allow the DOR to levy on the unclaimed property of the apparent owner by filing a claim with the Indiana Attorney General in accordance with procedures described in I.C. § 32-34-1-36.⁴⁴⁵

I.C. § 6-8.1-9-3 (effective January 1, 2007) was amended to provide that I.C. § 6-8.1-9 does apply to refund claims under the motor carrier fuel use tax.⁴⁴⁶

I.C. § 6-8.1-10-13 (effective July 1, 2006) was added to provide penalties if a person operates a commercial motor vehicle without required credentials or operates with altered credentials.⁴⁴⁷

8. *Non-Title Six Amendments.*—I.C. § 4-32 (effective July 1, 2006) was repealed.⁴⁴⁸ This transfers the license and regulation of charity gaming from the DOR to the Indiana gaming commission.

I.C. § 7.1-3-26-9 (effective July 1, 2006) was added to allow out of state wineries to sell direct to the Indiana consumer.⁴⁴⁹ This amendment requires the out of state winery to remit to the DOR all alcoholic beverage taxes and sales taxes on a monthly basis.⁴⁵⁰

I.C. § 8-15.5-8-2 (upon passage) was added to provide that income received by an operator under the terms of a public-private agreement is subject to taxation in the same manner as income received by other private entities (Indiana Toll Road).⁴⁵¹

I.C. § 8-15.5-8-3 (upon passage) was added to provide that an operator or any other person purchasing tangible personal property for incorporation into or improvement of a structure or facility constituting or becoming part of the land

440. 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 6 (West).

441. *Id.*

442. *Id.* § 7.

443. *Id.* § 8.

444. *Id.*

445. *Id.* § 9.

446. *Id.* § 11.

447. 2006 Ind. Legis. Serv. P.L. 176-2006 (H.E.A. 1214) § 7 (West).

448. 2006 Ind. Legis. Serv. P.L. 91-2006 (S.E.A. 100) § 15 (West).

449. 2006 Ind. Legis. Serv. P.L. 165-2006 (H.E.A. 1016) § 34 (West).

450. *Id.*

451. 2006 Ind. Legis. Serv. P.L. 47-2006 (H.E.A. 1008) § 39 (West).

included in the toll road project is not exempt from the sales tax with respect to such purchase (Indiana Toll Road).⁴⁵²

I.C. § 8-15.7-7-2 (upon passage) was added to provide that an operator or any other person purchasing tangible personal property for incorporation into or improvement of a structure or facility constituting or becoming part of the land included in a project is entitled to an exemption from the sales and use tax for that tangible personal property (Interstate 69).⁴⁵³

I.C. § 8-15.7-7-3 (upon passage) was added to provide that income received by an operator under the terms of a public-private agreement is subject to taxation in the same manner as income received by other private entities (Interstate 69).⁴⁵⁴

I.C. § 9-13-2-78 (upon passage) was amended to provide that a person enrolled as a student truck driver of a truck driver training school, and has a legal residence in another state but is living in Indiana for the sole purpose of taking a course of study from a truck training school, and intends to return to his or her home state after completing his or her training will be considered an Indiana resident.⁴⁵⁵

I.C. § 9-24-6-5.5 (upon passage) was added to provide that a student of a truck driver training school and a truck driver training school are subject to rules adopted by the DOR.⁴⁵⁶

I.C. § 22-11-14-12 (effective June 1, 2006) was added to provide a public safety user fee of 5% on the retail sale of fireworks to be collected by the DOR and deposited in the state general fund.⁴⁵⁷

I.C. § 22-11-14-14 (effective June 1, 2006) was added to provide that an individual who is an individual retailer and has a duty to remit the public safety fee holds the public safety fee in trust for the state and is personally liable for the payment of the fee.⁴⁵⁸

I.C. § 22-11-14-15 (effective June 1, 2006) was added to require the fire prevention and building safety commission and the DOR to adopt rules to carry out this act.⁴⁵⁹

I.C. § 27-5.1-2-8 (effective January 1, 2006) was amended to provide that a farm mutual insurance company may elect to either pay the premium tax or the corporate adjusted gross income tax.⁴⁶⁰

I.C. § 36-7-31-14.1 (effective July 1, 2006) was amended to provide that the additional \$11 million that the capital improvement board receives from the sales tax and withholding tax does not terminate until January 1 of the year after the

452. *Id.*

453. *Id.* § 40.

454. *Id.*

455. 2006 Ind. Legis. Serv. P.L. 188-2006 (H.E.A. 1300) § 2 (West).

456. *Id.* § 9.

457. 2006 Ind. Legis. Serv. P.L. 187-2006 (H.E.A. 1099) § 12 (West).

458. *Id.* § 14.

459. *Id.* § 15.

460. 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 47 (West).

year that no obligations are outstanding.⁴⁶¹

9. *Non Code Provisions*.—Public Law 162-2006, Section 53 (upon passage) provides that the provision to require the add back of intangible expenses does not affect the legitimacy or illegitimacy of deductions claimed by the taxpayer for taxable years beginning before July 1, 2006.⁴⁶² It also provides that the DOR may adopt temporary rules to implement the intangible expense add back provisions.⁴⁶³

Public Law 162-2006, Section 55 (upon passage) provides that the DOR shall adopt temporary rules to implement the provisions of the utility services use tax, and the home energy assistance program sales tax exemption.⁴⁶⁴

Public Law 162-2006, Section 22 (upon passage) was added to require the DOR to carry out the provisions of the fireworks bill by issuing written guidelines.⁴⁶⁵

Public Law 137-2006, Section 17 (effective January 1, 2006) provides that the entire chapter (I.C. § 6-3.1-30) concerning the headquarters relocation tax credit takes effect on January 1, 2006 instead of January 1, 2007.⁴⁶⁶

Senate Bill No. 169, Section 1 (effective July 1, 2006) extends until August 1, 2007, the quality care assessment fee levied on health care facilities.⁴⁶⁷

Senate Bill No. 355, Section 22 (effective January 1, 2006) was added to permit an additional deduction in 2006 against adjusted gross income for the payment of delayed property taxes payable in 2005. Delayed property taxes include the 2002, 2003, and 2004 assessment years where the taxpayer was not delinquent in remitting the property tax to the county treasurer when the property tax was paid in 2005.⁴⁶⁸

Public Law 111-2006, Section 12 (effective July 1, 2006) provides authority for the DOR to adopt temporary rules to implement a staggered system of renewal for the retail merchant's certificate.⁴⁶⁹

II. INDIANA SUPREME COURT DECISIONS

During 2006, the Supreme Court issued six opinions in the area of taxation, and all six decisions related to property tax.

461. 2006 Ind. Legis. Serv. P.L. 120-2006 (S.E.A. 259) § 6 (West).

462. 2006 Ind. Legis. Serv. P.L. 162-2006 (H.E.A. 1001) § 53 (West).

463. *Id.*

464. *Id.* § 55.

465. 2006 Ind. Legis. Serv. P.L. 187-2006 (H.E.A. 1099) § 22 (West).

466. 2006 Ind. Legis. Serv. P.L. 137-2006 (H.E.A. 1380) § 17 (West).

467. S.B. 169, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006), available at www.in.gov/legislative/bills/2006/SB/SB0169.1.htm.

468. S.B. 355, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006), available at www.in.gov/legislative/bills/2006/SB/SB0355.1.htm.

469. 2006 Ind. Legis. Serv. P.L. 111-2006 (S.E.A. 362) § 12 (West).

A. Wayne County Property Tax Assessment Board of Appeals v. United Ancient Order of Druids—Grove #29⁴⁷⁰

In this opinion, the Supreme Court addressed an issue certified to it on interlocutory appeal from a case pending in the Tax Court.⁴⁷¹ The parties below disagreed as to how to calculate the time for filing the agency record in a property tax assessment appeal in accordance with both Tax Court Rule 3(E) and the AOPA.⁴⁷² Tax Court Rule 3(E) provides that the petitioner has 30 days after filing a petition for appeal to request a certified copy of the agency record and 30 days after receiving notice that the record was prepared to file with the Tax Court.⁴⁷³ The relevant AOPA section provides that a taxpayer must file a certified copy of the agency record with the court within 30 days after filing a petition for appeal or within further time allowed by the court.⁴⁷⁴ The Supreme Court rejected an argument that the two provisions, when read together, require the taxpayer to both request and file a certified copy of the record within 30 days after filing a petition for appeal.⁴⁷⁵ It recognized that the AOPA provision provides that a record is timely filed if it is filed within 30 days or within additional time allowed by the court.⁴⁷⁶ The Supreme Court considers Tax Court Rule 3(E) to be a blanket grant of additional time for all tax appeals.⁴⁷⁷ To require individual hearings would place a very heavy burden on the Tax Court because extensions would usually be necessary due to the seasonal nature of property tax appeals.⁴⁷⁸ The Supreme Court upheld the Tax Court's order that the time limits under Tax Court Rule 3(E) applied.⁴⁷⁹

B. Trinity Homes, LLC. v. Fang⁴⁸⁰

The Supreme Court reversed the trial court decision in this small claims contract case.⁴⁸¹ Fang purchased a lot in a subdivision from Trinity Homes on

470. 847 N.E.2d 924 (Ind. 2006).

471. *Id.* at 925.

472. *Id.* at 926-27.

473. *Id.* at 926.

474. *Id.* at 926-27 (citing IND. CODE § 4-21.5-5-13(a) (2005)).

475. *Id.* at 927.

476. *Id.* at 928.

477. *Id.*

478. *Id.*

479. *Id.* The parties also disputed whether or not the petitioner was in compliance with Trial Rule 3(E). The BTR prepared an invoice for the taxpayer's request for a certified record that referred to preparation of the record as if it had not yet happened. The taxpayer disputes ever receiving this notice. Both the Tax Court and the Supreme Court held that receipt was immaterial because the terms of the invoice were insufficient to notify the taxpayer that the record had actually been prepared. *Id.* at 928 29.

480. 848 N.E.2d 1065 (Ind. 2006).

481. *Id.* at 1067, 1069.

March 3, 2000.⁴⁸² The purchase agreement included a provision that read, in part, “[Trinity Homes] agrees to pay first real estate installment due after settlement.”⁴⁸³ Trinity Homes paid the property tax installments due in May and November 2000.⁴⁸⁴ Those installments were for the 1999 assessment of the property, before Trinity subdivided the development into individual lots.⁴⁸⁵ Fang’s lot was assessed individually in 2000, and he received a bill for the first installment of that assessment due in May 2001.⁴⁸⁶ He paid the bill and requested reimbursement from Trinity Homes.⁴⁸⁷ They refused so he filed an action in small claims court to recover the payment.⁴⁸⁸ Fang argued that the installments that were paid in May and November 2000 were not on his property but on the development as a whole.⁴⁸⁹ Therefore, those payments could not be the installment referred to in the purchase agreement.⁴⁹⁰ Instead, because his property was only assessed for the first time in 2000, the May 2001 payment was the first installment due and Trinity Homes should have paid it.⁴⁹¹ Both the trial court and the Court of Appeals held that the contract provision was ambiguous and should be construed in favor of Fang.⁴⁹² The Supreme Court, however, disagreed that the provision was ambiguous.⁴⁹³ The only question was whether or not the 1999 assessment (that Trinity paid in 2000) applied to Fang’s individual lot.⁴⁹⁴ The court reasoned that it did, even though the lot was not individually assessed, because that lot (and the remainder of the entire tract of land) was subject to the lien acquired by the state on the 1999 assessment.⁴⁹⁵ Rather than finding that Trinity Homes should have paid the May 2001 installment, it found that Fang unexpectedly benefited from Trinity Homes’s payment of the November 2001 installment - one more than it was required to pay.⁴⁹⁶ The court reversed the lower court decision and ordered judgment for Trinity Homes.⁴⁹⁷

482. *Id.* at 1067.

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.* at 1068.

494. *Id.* at 1069.

495. *Id.*

496. *Id.*

497. *Id.* A dissenting opinion also found the term to be unambiguous - but in favor of Fang. The dissent highlights the terms in the sales agreement that refer to property taxes on the “real estate”—defined as the individual lot in the same agreement. According to the terms of the agreement, Trinity Homes should have paid the May 2001 installment of property taxes.

C. *Bonney v. Indiana Finance Authority*⁴⁹⁸

In a decision concerning the “Major Moves” legislation, the Supreme Court addressed the constitutionality of a property tax exemption granted by statute to the company leasing the Indiana Toll Road from the state.⁴⁹⁹ Prior to the Major Moves legislation, statutes required that if exempt property were leased to a party whose property was non-exempt, then the exempt property would also be subject to property taxes.⁵⁰⁰ The plaintiffs in this case argued that a new statutory provision enacted by the GA that specifically exempted the lessee of the Indiana Toll Road⁵⁰¹ from paying property tax on the road was unconstitutional because it violated Article X, Section 1 of the Indiana Constitution.⁵⁰² That section requires that a property tax system be uniform and fair, and that the GA may exempt property being used for municipal purposes.⁵⁰³ The taxpayers argued that past Supreme Court decisions required public ownership of the property as well as an acceptable use of the property before the property could be exempt from taxes.⁵⁰⁴ However, the Supreme Court held that public ownership is not necessary because the Constitution defines classes of exempt property by its use.⁵⁰⁵ Because the property will continue to be used in the same manner that it had been—as a public highway—it would continue to be eligible for an exemption from property taxes.⁵⁰⁶

D. *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc.
v. Auditor of Monroe County*⁵⁰⁷

The Supreme Court prohibited legislation that gave only three taxpayers an exemption from property tax deadlines that otherwise applied to everyone.⁵⁰⁸ The taxpayers were all fraternity chapters located on the Bloomington campus of Indiana University.⁵⁰⁹ Each of the three failed to file timely applications to exempt their Monroe County property from taxation, resulting in each chapter being assessed property taxes in 2000 and 2001, payable in 2001 and 2002.⁵¹⁰ In 2003, The GA passed a law that, by its terms, applied only to these three taxpayers and only for the tax years in which they failed to file a timely

498. 849 N.E.2d 473 (Ind. 2006).

499. *Id.* at 486-88.

500. *Id.* at 486 (citing IND. CODE § 6-1.1-10-37 (2006)).

501. IND. CODE § 8-15.5-8-1 (2004).

502. *Bonney*, 849 N.E.2d at 487.

503. *Id.* (citing IND. CONST. art X, § 1).

504. *Id.* at 487-88.

505. *Id.* at 488.

506. *Id.*

507. 849 N.E.2d 1131 (Ind. 2006).

508. *Id.* at 1133.

509. *Id.*

510. *Id.*

application for exemption.⁵¹¹ One of the taxpayers filed a refund claim, whereupon the county auditor filed this action for a declaratory judgment that the law was an invalid special law.⁵¹² After a lengthy review of the history behind the constitutional probation on special laws,⁵¹³ the court addressed the merits of this case. The taxpayers argued that the law is general because it is not limited to a single locality, but applies to fraternities located on any of Indiana University's eight campuses.⁵¹⁴ However, the Supreme Court referred to an earlier decision where it stated that a "statute is general if it applies to all persons or places of a specified class throughout the state."⁵¹⁵ Because "property-owning fraternities and sororities" is the "smallest relevant class" that is eligible for an exemption from property tax, a statute that subdivides that class even further is necessarily special.⁵¹⁶ The taxpayers argued that they faced unique circumstances that justified the special law, including that the financial burden of paying the property tax assessments would increase already high education costs.⁵¹⁷ However, the Supreme Court held that the circumstances faced by these three taxpayers were no different than those faced by any other fraternity or sorority in the state and did not justify the special law.⁵¹⁸ The dissenting justice believed that the court's decision was a violation of the Separation of Functions Clause because the court substituted a test of its own making (whether or not a class was unique enough to warrant a special law) for the determination of the GA.⁵¹⁹

*E. Packard v. Shoopman*⁵²⁰

The Supreme Court upheld a Tax Court decision⁵²¹ that, in addition to ruling on the merits of a property tax assessment, held that the taxpayer's failure to file a timely petition for review was not sufficient to deprive the Tax Court of jurisdiction unless the assessor objected to the timeliness in its first response to the petition.⁵²² Although there was some dispute in the Tax Court about which deadline applied because of multiple statutory amendments during the case proceedings, the assessor did not raise an objection to the timeliness of the petition until almost two years after first raising a motion to dismiss certain

511. *Id.*

512. *Id.*

513. *Id.* at 1134-36.

514. *Id.* at 1136.

515. *Id.* (quoting *City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003)) (internal quotes omitted).

516. *Id.* at 1136-37.

517. *Id.* at 1138-39.

518. *Id.* at 1139.

519. *Id.* at 1139-40 (J. Sullivan, dissenting).

520. 852 N.E.2d 927 (Ind. 2006).

521. *Shoopman v. Clay Twp. Assessor*, 827 N.E.2d 662 (Ind. Tax Ct. 2005).

522. *Packard*, 852 N.E.2d at 928.

named respondents.⁵²³ The assessor argued that a statute deprived the Tax Court of subject matter jurisdiction over a case if a taxpayer failed to comply with any statutory requirement when raising an appeal⁵²⁴ and that subject matter jurisdiction could not be waived.⁵²⁵ However, the Tax Court and the Supreme Court both held that a taxpayer's failure to timely file a petition was mere procedural error that could be waived if not raised at the first opportunity and not jurisdictional error that would prevent the Tax Court from hearing the case regardless of when the error was raised.⁵²⁶

*F. Department of Local Government Finance
v. Roller Skating Rink Operators Ass'n*⁵²⁷

The Supreme Court reversed a 2005 Tax Court decision⁵²⁸ that granted an educational-purpose exemption to a trade association for its office and storage buildings.⁵²⁹ The association presents educational programs to its members during its convention and trade shows⁵³⁰ and the association applied for an educational-purpose exemption for its office and buildings because the materials for the educational programs were stored in those buildings.⁵³¹ Although the educational programs offered by the association are not accredited, they provide training on topics that overlap those in the recreation management and business education programs offered by state schools.⁵³² Participants in the schools can earn credit for continuing education at the University of Wisconsin.⁵³³ Both the Marion County Property Tax Assessment Board of Appeals and the SBTC denied the exemption.⁵³⁴ However, the Tax Court granted the exemption, because the association's "property was predominantly used for educational purposes and that [its] use of the property was reasonably necessary to further its purpose of providing education."⁵³⁵ The Supreme Court reviewed the Tax Court's decision *de novo* and determined that its reading of the educational exemption was "too expansive."⁵³⁶ To qualify for the educational exemption, a taxpayer must not only

523. *Id.* at 928-29.

524. *Id.* at 929.

525. *Id.*

526. *Id.* at 931-32.

527. 853 N.E.2d 1262 (Ind. 2006).

528. *Roller Skating Rink Operators Ass'n v. Dep't of Local Gov't Fin.*, 839 N.E.2d 831 (Ind. Tax Ct. 2005).

529. *Roller Skating Rink Operators Ass'n*, 853 N.E.2d at 1263.

530. *Id.*

531. *Id.*

532. *Id.* at 1264.

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.* at 1265. The DLGF also challenged the timeliness of the association's petition to the Tax Court, but the Supreme Court held that it had waived that objection by not raising it with the

provide education to others but also must “provide[] some public benefit.”⁵³⁷ The Supreme Court reviewed a number of earlier decisions that, in its view, had properly granted an education exemption to programs at private schools, programs that provided training not otherwise available in public schools, and programs that only relieved the state of Indiana’s burden of education in a limited fashion.⁵³⁸ However, each of those programs was “offered to the public and did not further the business objectives of the attendees.”⁵³⁹ The Tax Court should have reviewed the SBTC’s decision for an abuse of discretion.⁵⁴⁰ The Supreme Court found that the SBTC had not abused its discretion.⁵⁴¹ Rather, substantial evidence supported the SBTC’s conclusion that the training provided by the association to its members was incidental to its promotional activities and that the training did not provide a public benefit.⁵⁴² The association was denied the educational purpose exemption.⁵⁴³

III. INDIANA TAX COURT DECISIONS

The Tax Court rendered a variety of opinions from January 1, 2006, to December 31, 2006. Specifically, the Tax Court issued 16 published opinions and decisions: 12 of which concerned the Indiana real property tax; three of which concerned the Indiana inheritance tax; and one of which concerned the riverboat wagering tax. A summary of each opinion and decision appears below.

A. *Property Tax*

1. *College Corner, L.P. v. Department of Local Government Finance*.⁵⁴⁴—College Corner, L.P. (“CCLP”) initiated this action on January 2, 2002, appealing the denial of a property tax exemption for the 2000 tax year.⁵⁴⁵ CCLP is a limited partnership with one general partner, the Old Northside Foundation, Inc. (“ONF”), and one limited partner, the National City Community Development Corporation (“NCCDC”).⁵⁴⁶ NCCDC is an Ohio for-profit corporation.⁵⁴⁷ ONF is an Indiana not-for-profit corporation and is a 501(c)(3) charitable organization.⁵⁴⁸ CCLP was formed to revitalize the College Corner area in the historic Old Northside of Indianapolis by rebuilding the area’s

Tax Court. *Id.* at 1264.

537. *Id.* (citing *State Bd. of Tax Comm’rs v. Ft. Wayne Sport Club, Inc.*, 258 N.E.2d 874, 881 (Ind. Ct. App. 1970)).

538. *Id.* at 1265-66.

539. *Id.* at 1266.

540. *Id.* at 1265.

541. *Id.* at 1267.

542. *Id.*

543. *Id.*

544. 840 N.E.2d 905 (Ind. Tax Ct. 2006).

545. *Id.* at 906-07.

546. *Id.* at 906.

547. *Id.*

548. *Id.*

infrastructure, renovating existing home and building new homes.⁵⁴⁹ NCCDC contributed \$248,000 to the partnership that was used to secure mortgages on 17 parcels in the area.⁵⁵⁰ In exchange for its investment, NCCDC was to receive a fixed 7% return on the amount which NCCDC advanced for each property redeveloped and sold.⁵⁵¹ CCLP filed applications for a property tax exemption for each of the 17 parcels for the 2000 tax year, claiming that it was “entitled to the charitable purposes exemption provided by I.C. § 6-1.1-10-16(a).”⁵⁵² The applications were denied by the Marion County Property Tax Assessment Board of Appeals and by the SBTC. The DLGF, which was substituted for the SBTC as respondent, argued that CCLP had not shown that its use of the property would provide “relief of human want” as required by Indiana law.⁵⁵³ However, the Tax Court said that “the term ‘charity’ must be broadly construed and . . . encompass[ed] more than simply providing relief to the needy.”⁵⁵⁴ CCLP presented a *prima facie* case demonstrating that its restoration of the College Corner area would result in a number of benefits to the community that meet charitable purposes: assistance in combating community deterioration, preservation of the historical character of the area, and relief of the government burden to provide and maintain infrastructure such as sidewalks and alleys.⁵⁵⁵ The DLGF also argued that CCLP should not qualify for an exemption because NCCDC will earn a profit from its investment.⁵⁵⁶ However, the statute language that grants a charitable purpose exemption from property tax does so for any type of entity which otherwise qualifies for the exemption, regardless of the entity’s profit motive.⁵⁵⁷ In addition, the profit realized by NCCDC is secondary to its stated charitable purpose of revitalizing neighborhoods such as College Corner.⁵⁵⁸ The Tax Court noted that the SBTC failed to address any of CCLP’s evidence of its charitable purposes and also ignored previous Indiana court decisions that have held that an organization’s profit motive does not determine whether or not it serves a charitable purpose.⁵⁵⁹ The Tax Court reversed the SBTC’s final determination because it was “unsupported by substantial evidence, arbitrary, capricious, and . . . an abuse of discretion.”⁵⁶⁰

2. *Eckerling v. Wayne Township Assessor*.⁵⁶¹—The Eckerlings initiated this

549. *Id.* at 906-07.

550. *Id.* at 907.

551. *Id.*

552. *Id.*

553. *Id.* at 909.

554. *Id.*

555. *Id.* at 909-10.

556. *Id.* at 911.

557. *Id.*

558. *Id.*

559. *Id.* at 911-12.

560. *Id.* at 912.

561. 841 N.E.2d 674 (Ind. Tax Ct. 2006).

appeal of the 2002 assessment of their property on February 9, 2005.⁵⁶² The Eckerlings' land is located in Wayne Township, Marion County, Indiana, and has an improvement on the land that was originally built as a single-family residence but that is currently being used as an office.⁵⁶³ There were no alterations made to the improvement to convert it from a single-family residence to an office.⁵⁶⁴ The Wayne Township Assessor ("assessor") used the residential pricing guidelines in valuing the improvement.⁵⁶⁵ The Eckerlings appealed the assessment arguing that the improvement should be valued according to commercial guidelines instead because it was being used as an office.⁵⁶⁶ This appeal follows the BTR's final determination that upheld the assessment.⁵⁶⁷ For a taxpayer to successfully seek reversal of a final determination of the BTR, the taxpayer must have submitted evidence regarding the error during the administrative hearing process that substantiates a *prima facie* case that an error occurred in the assessment.⁵⁶⁸ The new assessment system assesses real property based on its market value-in-use.⁵⁶⁹ The Tax Court explained that "a property's market value-in-use 'may be thought of as the ask price of the property by its owner,'"⁵⁷⁰ and lists three generally accepted appraisal techniques for calculating a property's market value-in-use: the cost approach, the sales comparison approach, and the income approach.⁵⁷¹ Because tax assessors are limited in their resources, the cost approach is the primary method for assessing real property in Indiana.⁵⁷² However, the cost method is not mandatory and failure to comply with the assessment guidelines is not an indication that the assessment is not a reasonable measure of the property's market value-in-use.⁵⁷³ An assessment is presumed to be correct unless the taxpayer can prove otherwise.⁵⁷⁴ The Eckerlings argued that the assessment should have reflected the improvement's current use as an office if it were to accurately reflect the improvement's market value-in-use.⁵⁷⁵

However, a taxpayer must show that the assessment is not an accurate reflection of the property's market value-in-use, not just that the assessor did not strictly adhere to the guidelines.⁵⁷⁶ One way that a taxpayer can rebut the

562. *Id.* at 674-75.

563. *Id.* at 674.

564. *Id.*

565. *Id.*

566. *Id.* at 674-75.

567. *Id.* at 675.

568. *Id.*

569. *Id.*

570. *Id.* (quoting IND. TAX COMM'RS, 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (2002)).

571. *Id.*

572. *Id.*

573. *Id.*

574. *Id.* at 676.

575. *Id.* at 678.

576. *Id.*

presumption that the assessment is correct is to provide a professional appraisal of the property, use information such as “actual construction costs, sales information regarding the subject or comparable properties,” or other information as long as the additional information was available to the assessor at the time of the assessment.⁵⁷⁷ The Eckerlings did not provide any of this evidence, focusing instead on the alleged failure of the assessor to follow the guidelines.⁵⁷⁸ This is not sufficient to rebut the presumption that the assessment was correct so the final determination of the BTR was affirmed.⁵⁷⁹

3. *PIA Builders & Developers, LLC v. Jennings County Assessor*.⁵⁸⁰—In this consolidated opinion, the Tax Court denied three substantially identical petitions for rehearing by separate taxpayers.⁵⁸¹ The taxpayers argued that: 1) assessing officials can only use the cost approach for assessing property; 2) the assessing officials in the cases at bar ignored that law and adjusted the assessments to more accurately reflect the properties’ market values-in-use; and 3) the Tax Court “endorsed the misapplication of the law” in making the rulings that it did.⁵⁸² The Tax Court reiterated what it “explained in great length” in the cases below: that the goal of the new assessment system in Indiana is to accurately reflect a property’s market value-in-use.⁵⁸³ The assessment guidelines provide a variety of assessment approaches, including the cost approach.⁵⁸⁴ Further, the guidelines state that the cost approach is merely a starting point for determining a property’s market value-in-use.⁵⁸⁵ The old system of assessment considered an assessment to be accurate if the regulations were correctly applied while the new system focuses more on ensuring that the assessed value is actually correct than on strict application of regulations.⁵⁸⁶ The Tax Court denied the petitions saying that under the new system, a taxpayer cannot argue form over substance but must show that the assessed value is not an accurate reflection of the property’s market value-in-use.⁵⁸⁷

4. *BP Products North America, Inc. v. Matonovich*.⁵⁸⁸—BP Products North America, Inc. (BP) owned land and improvements in Lake County, Indiana, and initiated this action on April 4, 2003, to appeal the BTA’s denial of its June, 2000, petitions for review of assessments made in 1999.⁵⁸⁹ In June 2000, BP made 79 separate claims of review of assessments to the SBTC, claiming that its

577. *Id.*

578. *Id.*

579. *Id.*

580. 842 N.E.2d 899 (Ind. Tax Ct. 2006).

581. *Id.* at 899-900.

582. *Id.* at 900.

583. *Id.*

584. *Id.*

585. *Id.*

586. *Id.*

587. *Id.* at 900-01.

588. 842 N.E.2d 901 (Ind. Tax Ct. 2006).

589. *Id.* at 902-03.

property was assessed at a higher value than other property in the county.⁵⁹⁰ In its appeal to the SBTC, BP submitted a number of studies and reports that showed that property in Lake County was generally assessed at lower than fair market value while its property was assessed for more than its fair market value.⁵⁹¹ BP requested that its assessment be reduced by application of an equalization adjustment.⁵⁹² The SBTC denied the petitions for two reasons: equalization was a remedy available “only to a group, or class, of taxpayers, and not to an individual taxpayer;” and, even if equalization were available to BP as an individual taxpayer, the studies and reports it provided were irrelevant because they used an incorrect standard (fair market value) to measure uniformity.⁵⁹³ While this case was pending before the Tax Court, the Supreme Court issued its opinion in *DLGF v. Commonwealth Edison Co. of Indiana*⁵⁹⁴ in which it found “ample statutory authority allowed individual taxpayers to seek [equalization] adjustments”⁵⁹⁵ In addition, the Supreme Court ruled that studies showing disparities in fair market value to challenge assessments based on fair market value were irrelevant for assessments prior to 2002 because the assessment system was based on a property’s “true tax value” (“TTV”).⁵⁹⁶ In light of this ruling, the Tax Court requested additional briefs from the parties to determine if BP provided any evidence at the administrative hearing that could support its claim for an equalization adjustment.⁵⁹⁷ BP admitted that its initial case was founded on calculations and data that the Supreme Court later held to be invalid.⁵⁹⁸ However, it had also submitted a study that compared the assessments made by local township assessors to those made for the same properties by employees of the SBTC.⁵⁹⁹ That study found that residential real property in North Township was under-assessed by 38%, commercial real property by 11%, and industrial real property by 8%.⁶⁰⁰ BP claimed that it was entitled to a 38% equalization reduction in the assessment on its property.⁶⁰¹ However, the Tax Court referenced many prior decisions that made it clear that property could only be compared with similar property for purposes of determining uniformity and equality in the tax burden on the property.⁶⁰² The study that BP relied upon was solely concerned with the valuation of real property, while the evidence in BP’s 1999 assessment showed that over 80% of

590. *Id.* at 902 n.2.

591. *Id.* at 903.

592. *Id.*

593. *Id.*

594. 820 N.E.2d 1222 (Ind. 2005).

595. *Id.* at 1226.

596. *BP*, 842 N.E.2d at 903.

597. *Id.*

598. *Id.* at 904.

599. *Id.* at 904-05.

600. *Id.* at 905.

601. *Id.* at 905 n.6.

602. *Id.* at 905-06.

the assessed value was attributable to personal property.⁶⁰³ The Tax Court held that BP failed to show that its assessment was not uniform with assessments of other personal property and denied the appeal.⁶⁰⁴

5. *Bedford Apartments v. Jean*.⁶⁰⁵—Bedford Apartments (“Bedford”) initiated this action on October 30, 2003, appealing the 2001 assessment of its apartment complex located in Shawswick Township, Lawrence County, Indiana.⁶⁰⁶ Bedford claimed that the Shawswick Township Assessor (“assessor”) failed to properly factor in the obsolescence in the property.⁶⁰⁷ Bedford had failed to file a copy of the agency record with the Tax Court before oral arguments on September 10, 2004.⁶⁰⁸ The Tax Court noted this, but continued to hear the oral arguments and took the failure to file the agency record under advisement.⁶⁰⁹ Bedford filed a copy of the agency record on September 13, 2004, and the assessor moved to dismiss on September 17, 2004.⁶¹⁰ The assessor claimed that the Tax Court lacked subject matter jurisdiction to decide the claim because of Bedford’s failure to timely file the agency record under either the AOPA or the Tax Court’s Rule 3(E).⁶¹¹ The AOPA requires that the petitioner submit a copy of the agency record within 30 days of filing the petition.⁶¹² Rule 3(E) of the Tax Court requires that the petitioner submit a copy of the agency record within 30 days after receiving notification from the BTR that the record has been prepared.⁶¹³ Although the precise relationship of these two rules was under review by the Supreme Court at the time of this decision, the Tax Court said that its ruling on the motion to dismiss would not change regardless of the outcome of the Supreme Court case.⁶¹⁴ The assessor claimed that the Tax Court did not have subject matter jurisdiction over Bedford’s appeal because it failed to timely file the agency record.⁶¹⁵ The Tax Court disagreed because Bedford’s appeal met both of the jurisdictional requirements set forth in I.C. § 33-26-3-1; it was a challenge to the assessment of Indiana property tax and is an initial

603. *Id.* at 906.

604. *Id.* at 906-07.

605. 843 N.E.2d 78, 79 (Ind. Tax Ct. 2006).

606. *Id.*

607. *Id.*

608. *Id.*

609. *Id.*

610. *Id.*

611. *Id.* at 79-80.

612. *Id.* at 80 n.1(quoted IND. CODE § 4-21.5-5-14(a) (2005)).

613. *Id.* (quoting IND. TAX CT. R. 3(E)).

614. *Id.* The Supreme Court case referred to *Wayne County Property Tax Assessment Board of Appeals v. United Ancient Order of Druids—Grove #29*, 847 N.E.2d 924 (Ind. 2006), which was decided on May 18, 2006. The Supreme Court held that the two rules are not incompatible because the AOPA allows a court to authorize additional time and the Tax Court’s Rule 3(E) is such an authorized extension of time. *Bedford Apartments*, 843 N.E.2d at 80.

615. *Bedford Apartments*, 843 N.E.2d at 80.

appeal from a final determination made by the BTR.⁶¹⁶ However, the Tax Court noted that because it has “subject matter jurisdiction does not necessarily mean that it has jurisdiction over the particular case.”⁶¹⁷ “[T]he timely filing of the agency record goes to jurisdiction over a particular case, not subject matter jurisdiction.”⁶¹⁸ However, a party must raise the issue of jurisdiction over a particular case at the earliest possible opportunity or the issue is waived.⁶¹⁹ In this case, the assessor did not file a motion to dismiss until the case was nearly complete.⁶²⁰ Because the motion to dismiss was not filed as early as it could have been and because there was no demonstrable delay caused by the error, the Tax Court denied the motion to dismiss.⁶²¹

6. *Bakos v. Department of Local Government Finance*.⁶²²—The Bakoses initiated a second original tax appeal of the 2002 assessment of their real property on December 19, 2005.⁶²³ This decision was on a motion to dismiss for lack of jurisdiction filed by the DLGF.⁶²⁴ The Bakoses owned residential property in Lake County and challenged the assessment of its value, claiming that the square footage of their home was erroneously calculated and that their home’s assessed value was too high in comparison to other homes in the neighborhood.⁶²⁵ The DLGF filed this motion to dismiss claiming that the Tax Court did not have jurisdiction over the appeal.⁶²⁶ Although the DLGF raised several possible grounds for lack of jurisdiction, the Tax Court addressed only one: whether or not the Bakoses’ petition had been properly verified.⁶²⁷ When the Tax Court has subject matter jurisdiction over a matter, as it did in this case, the appeal must adhere to the AOPA and the Tax Court Rules.⁶²⁸ The Tax Court rules require that petitions be verified according to Indiana Trial Rule 11(B) which provided guidance for the content of an appropriate verification statement.⁶²⁹ Although precise wording is not required, a verification statement must attest to the validity of the statements contained in a petition and must subject the petitioners to the penalties of perjury.⁶³⁰ The Bakoses signed their petition, but did not attest to the truth of the representations made in it nor did

616. *Id.*

617. *Id.* at 81.

618. *Id.*

619. *Id.*

620. *Id.*

621. *Id.*

622. 848 N.E.2d 377 (Ind. Tax Ct. 2006).

623. *Id.* at 378. The first appeal was remanded to the BTR at the request of both parties. The BTR again denied relief to the Bakoses, leading to this appeal. *Id.*

624. *Id.*

625. *Id.* at 377-78.

626. *Id.* at 378.

627. *Id.* at 378 n.5.

628. *Id.* at 379.

629. *Id.*

630. *Id.*

they subject themselves to the penalties of perjury.⁶³¹ Because they failed to do this within the time limit for filing an appeal of an agency action, the Tax Court did not have jurisdiction over this particular case.⁶³² The Tax Court granted the motion to dismiss.⁶³³

7. *Will's Far-Go Coach Sales v. Nusbaum*.⁶³⁴—Will's Far-Go initiated this appeal to challenge assessment of its business personal property for the 1995 and 1996 tax years on December 24, 2004.⁶³⁵ Will's Far-Go sells its inventory in Fountain County and purchases much of its inventory from a wholesaler located in Elkhart County.⁶³⁶ On the date of assessment for the two tax years in question, some of Will's Far-Go's inventory had not yet been transported from the wholesaler's location due to inclement weather conditions.⁶³⁷ The wholesaler did not include that inventory on its personal property tax returns and indicated to the assessor that the property belonged to Will's Far-Go.⁶³⁸ The assessor sent Will's Far-Go the necessary documents to file a personal property return for the property located in Elkhart County.⁶³⁹ An employee of Will's FarGo told the assessor that they had reported the property on the tax return submitted to Fountain County and that they did not believe that they were required to file a return in Elkhart County.⁶⁴⁰ However, Will's Far-Go did not return any forms or documentation. The Tax Court called to the attention of the GA to some of the requirements that it felt were unnecessary but applied the law and rules as they were written.⁶⁴¹ The assessor in Elkhart County sent notices of assessment in 1995 and 1996 and later certified the taxes as delinquent (in 1997 and 1998).⁶⁴² Will's Far-Go filed Petitions for Correction of Error (Forms 133) with the Elkhart County Property Tax Assessment Board of Appeals ("PTABOA"), arguing that the taxes imposed were illegal because the inventory in question was not subject to the jurisdiction of the assessor in Elkhart County.⁶⁴³ The PTABOA denied the request and Will's Far-Go appealed to the BTR.⁶⁴⁴ In 2004, the BTR denied the appeal because the 133 forms were not timely filed, but it did not address the legality of the assessments.⁶⁴⁵ Will's Far-Go then initiated on

631. *Id.*

632. *Id.*

633. *Id.* The Tax Court also expressed its concern in a footnote over the number of recent cases that were dismissed from the Tax Court because of violations of procedural requirements.

634. 847 N.E.2d 1074 (Ind. Tax Ct. 2006).

635. *Id.* at 1075-76.

636. *Id.* at 1075.

637. *Id.*

638. *Id.*

639. *Id.*

640. *Id.*

641. *Id.*

642. *Id.*

643. *Id.*

644. *Id.*

645. *Id.* at 1076.

appeal.⁶⁴⁶

Will's Far-Go argued that the taxes were illegally assessed because personal property should be taxed in the location of its owner, unless it is permanently located elsewhere.⁶⁴⁷ They argue that, because the inventory was awaiting transport to Fountain County, it should have been taxed there instead of being taxed at its temporary location in Elkhart County.⁶⁴⁸ Will's Far-Go also argued that there is no time limit for filing a Form 133.⁶⁴⁹ However, the Tax Court disagreed with Will's Far-Go and upheld the reasoning of the BTR.⁶⁵⁰ Although it found that the statute and regulation that allow for correction of error was ambiguous about a time limit, the Tax Court looked to common law precedent and judicial rules of construction to give effect to the intent of the administrative agency and to avoid unjust or absurd results.⁶⁵¹ Generally, taxpayers who wish to challenge the legality of a tax pay the tax first, then file a Form 133 to challenge the assessment of the taxes and separately file a petition for a refund of taxes.⁶⁵² Will's Far-Go did not pay the assessed taxes and was therefore not claiming a refund. However, the Tax Court refused to allow Will's Far-Go to achieve the same result of being relieved of the burden of its tax assessment by not paying the taxes up-front.⁶⁵³ To allow Will's Far Go to challenge the legality of the assessed taxes for an infinite time because they did not pay the taxes before claiming a refund would penalize those taxpayers who do pay their taxes.⁶⁵⁴ Will's Far-Go also argued that they would be penalized because the property had already been taxed in Fountain County.⁶⁵⁵ However, the Tax Court refused to allow Will's Far-Go to just ignore the assessments from Elkhart County.⁶⁵⁶ Will's Far-Go had plenty of notice and time to challenge the assessments but failed to do so in a timely manner.⁶⁵⁷ The Tax Court upheld the decision of the BTR that the Forms 133 were not timely filed.⁶⁵⁸

8. *Krol v. Indiana Board of Tax Review*.⁶⁵⁹—The Krols initiated an appeal of the 2002 assessment of their commercial real property in Lake County on February 8, 2006.⁶⁶⁰ This decision was on a motion to dismiss for lack of

646. *Id.*

647. *Id.* at 1077 n.4.

648. *Id.*

649. *Id.*

650. *Id.*

651. *Id.* at 1077-78.

652. *Id.* at 1077.

653. *Id.* at 1078.

654. *Id.*

655. *Id.* at 1078 n.5.

656. *Id.* at 1078.

657. *Id.*

658. *Id.* at 1079.

659. 848 N.E.2d 1185 (Ind. Tax Ct. 2006).

660. *Id.* at 1186.

jurisdiction filed by the BTR.⁶⁶¹ The BTR claimed that the Tax Court lacked jurisdiction over this case because the Krols did not properly verify their petition and did not name the proper respondent.⁶⁶² The Tax Court confirmed that it did have subject matter jurisdiction over the case because the claim challenged the assessment of property tax and is an initial appeal of a final determination of the BTR.⁶⁶³ The BTR argued that the petition failed to name the DLGF as a respondent as required by the Tax Court Rules.⁶⁶⁴ Although the caption of the petition did not name the DLGF as a respondent, the petition's body and an attached copy of the final determination of the BTR both included the DLGF.⁶⁶⁵ According to the Tax Court, that was "sufficient to identify the DLGF as a named respondent in accordance with the requirements of AOPA and Tax Court Rule 4."⁶⁶⁶ The BTR also argued that the petition was not properly verified because it was verified by the Krols' attorney and not by the petitioners.⁶⁶⁷ The Supreme Court's precedent⁶⁶⁸ provides that an attorney may verify a petition on behalf of a corporation and the Court of Appeals extended the same reasoning to allow an attorney to verify a petition on behalf of an individual.⁶⁶⁹ The Tax Court followed the reasoning of those earlier decisions in deciding "that because the AOPA, the Tax Court Rules, and the Trial Rules do not preclude an attorney from verifying a petition . . . the Krols' petition was properly verified."⁶⁷⁰ The Tax Court denied the motions to dismiss and required the parties to correct the caption to properly reflect the DLGF as the named respondent.⁶⁷¹

9. *Miller Beach Investments, LLC v. Department of Local Government Finance*.⁶⁷²—On February 24, 2006, Miller Beach initiated an appeal of four final determinations made by the BTR regarding assessments of its real property for the tax year 2002.⁶⁷³ This decision was on a motion to dismiss for lack of jurisdiction filed by the DLGF.⁶⁷⁴ The Tax Court first confirmed that it had subject matter jurisdiction over the appeals because the claims "challenge the

661. *Id.*

662. *Id.*

663. *Id.* at 1187.

664. *Id.*

665. *Id.*

666. *Id.*

667. *Id.* at 1188.

668. *Id.* at 1189 (citing *Ind. Dep't of Pub. Welfare v. Chair Lance Serv., Inc.*, 523 N.E.2d 1373, 1377 (Ind. 1988)).

669. *Id.* (citing *Giles v. County Dep't of Pub. Welfare of Marion County*, 579 N.E.2d 653, 655 (Ind. Ct. App. 1991)).

670. *Id.*

671. *Id.* at 1190.

672. 848 N.E.2d 1190 (Ind. Tax Ct. 2006).

673. *Id.* at 1192. At the time of the assessments, James Nowacki owned the 20 parcels that were the subject of the final determinations. He initiated the appeals, but had sold the properties to Miller Beach before the BTR conducted the hearings on the appeals. *Id.* at 1192 n.1.

674. *Id.* at 1193.

assessment of Indiana's property tax and they request review of a final determination of the Indiana Board."⁶⁷⁵ The DLGF argued that the Tax Court did not have jurisdiction over this particular case because Miller Beach had not sufficiently identified the agency action that it was appealing.⁶⁷⁶ The DLGF suggested that, in order to meet the statutory requirement⁶⁷⁷ that a petition identify the agency action, Miller Beach was required to attach a copy of the final determination to the appeal, as well as specifically identify the parcel and final determination in each of the four petitions.⁶⁷⁸ However, the Tax Court noted that a copy of the final determination is not required and, because Indiana is a notice pleading state, "a petition's allegations are generally sufficient if they put a reasonable person on notice as to why the petitioner is suing."⁶⁷⁹ The information included in the petitions was sufficient to notify the DLGF of which determinations were in question, especially when the "missing information, was included in notices of appearance that Miller Beach filed simultaneously with its petitions."⁶⁸⁰ The Tax Court denied the DLGF's argument because the petitions were sufficient and because public policy requires that cases are determined on their merits whenever possible and not on technicalities.⁶⁸¹ The DLGF also argued that the petitions were not properly verified because Miller Beach's attorney verified them, not Miller Beach.⁶⁸² The DLGF did not suggest who might verify the petition on behalf of Miller Beach - a corporation and not a natural person.⁶⁸³ The DLGF argued that allowing an attorney to verify a petition would lead to complacency on the part of the taxpayer and would reduce the taxpayer's personal responsibility.⁶⁸⁴ However, while court rules define how a petition may be verified, they do not specify who may verify a petition.⁶⁸⁵

The Tax Court looked to a Supreme Court case that addressed who may verify petitions on behalf of a corporation under the predecessor statutes to the AOPA.⁶⁸⁶ In that decision, the Supreme Court held that a corporation's attorney who had personal knowledge of the facts in the petition could verify the petition because the corporate attorney is an agent of the corporation and corporations cannot act other than through its agents.⁶⁸⁷ The DLGF conceded that Miller

675. *Id.* at 1192.

676. "[A] petition for judicial review must '[i]dentif[y] [] the agency action at issue, together with a copy, summary, or brief description of the agency action.'" *Id.* at 1193 (quoting IND. CODE § 4-21.5-5-7 (2005)).

677. *Id.*

678. *Id.* at 1193-94.

679. *Id.* at 1194.

680. *Id.*

681. *Id.*

682. *Id.* at 1194 n.5.

683. *Id.* at 1194.

684. *Id.* at 1195.

685. *Id.*

686. *Id.*

687. *Id.* (citing *Ind. Dep't of Pub. Welfare v. Chair Lance Serv., Inc.*, 523 N.E.2d 1373, 1377

Beach's attorney had personal knowledge of the facts contained in the petition.⁶⁸⁸ Because of this and following the reasoning of the earlier Supreme Court decision, the Tax Court held that Miller Beach's attorney could verify the petitions.⁶⁸⁹ The Tax Court denied the DLGF's motions to dismiss.⁶⁹⁰

10. *P/S, Inc. v. Indiana Department of State Revenue*.⁶⁹¹—On March 24, 2004, P/S initiated an action as an appeal of the DOR's denial of its claim for refund of costs associated with its underground storage tank fees (UST-1 fees) for tax years 1995-2001.⁶⁹² This opinion was on cross motions for summary judgment.⁶⁹³ P/S owned and operated underground storage tanks that were subject to the UST-1 fees beginning in 1995.⁶⁹⁴ P/S did not register its tanks with the DOR until 1999.⁶⁹⁵ The UST-1 fees were due annually on December 15th.⁶⁹⁶ The DOR generally provided notice of the payment schedule by mailing a UST-1 return to all owners of underground storage tanks that were in use on the July 1 assessment date.⁶⁹⁷ P/S claimed that it never received the annual returns, nor did it receive the demand notices that the DOR sent in April 2003.⁶⁹⁸ Because it alleged a lack of notice, P/S claimed a refund of all interest, collection fees and clerk costs paid in addition to the UST-1 fees.⁶⁹⁹ P/S first argued that it should not have to pay interest on the amounts due because it did not receive notice and was therefore not at fault for the late payment of the fees.⁷⁰⁰ The Tax Court, however, clarified that interest is not a penalty and is not a punishment.⁷⁰¹ The DOR already had waived the penalties for the years at issue but was not allowed to waive interest.⁷⁰² Interest on the late payments began to accrue on December 15th of each year.⁷⁰³ P/S also argued that the DOR should have had to pay the collection and clerk costs associated with the issuance of tax warrants because it would have paid the demand notices if it had received them.⁷⁰⁴ However, the DOR proved that it sent the notices, raising the presumption that P/S received

(Ind. 1988)).

688. *Id.*

689. *Id.* at 1195-96.

690. *Id.* at 1196.

691. 853 N.E.2d 1051 (Ind. Tax Ct. 2006).

692. *Id.* at 1051-52.

693. *Id.* at 1051.

694. *Id.* at 1052.

695. *Id.* at 1053.

696. *Id.*

697. *Id.* at 1052-53.

698. *Id.* at 1053. Of course, the DOR was not able to even send annual returns until after the tanks were registered in 1999. *Id.*

699. *Id.*

700. *Id.*

701. *Id.*

702. *Id.* at 1053-54.

703. *Id.* at 1054 n.4.

704. *Id.*

them.⁷⁰⁵ P/S provided no proof that it did not receive the demand notices, only a statement that it had not.⁷⁰⁶ After correcting a mathematical error in the collection fees assessed to P/S, the Tax Court granted the DOR's motion for summary judgment.⁷⁰⁷

11. 117 Republic, Ltd. Partnership v. Brown Township Assessor.⁷⁰⁸—On October 13, 2005, the taxpayer initiated an appeal of the BTR's final determination of the value of its real property on the March 1, 2003, assessment date.⁷⁰⁹ This decision was on the taxpayer's motion to have the case remanded to the BTR so that the taxpayer could present additional evidence that it had acquired after the administrative hearing.⁷¹⁰ During the administrative hearing, the taxpayer had claimed that the assessed value assigned to its property was higher than its market value-in-use.⁷¹¹ To support its assertion, it offered proof of the purchase price it paid for the property in 2003 and what that price would have been in 1999, the valuation date.⁷¹² After the hearing in December 2004, the taxpayer began to market the property for sale.⁷¹³ As part of that process, it had the property appraised in April 2005.⁷¹⁴ The taxpayer did not request to submit the appraisal to the Board as post-hearing evidence until August, nearly nine months after the hearing.⁷¹⁵ A few days later, the BTR denied the motion to admit the appraisal and issued a final determination upholding the assessment.⁷¹⁶ The taxpayer filed an appeal claiming that the BTR had abused its discretion by refusing to allow the appraisal as post-hearing evidence.⁷¹⁷ However, the BTR had a rule that will not allow post-hearing evidence unless the BTR requests it and it is submitted before the deadline imposed by the administrative law judge.⁷¹⁸ The Tax Court found that the taxpayer could have had the property appraised at any time, in fact had the appraisal for five months before requesting its submission, and was told at the hearing that no post-hearing evidence would be accepted.⁷¹⁹ Therefore, the Tax Court held that it was not an abuse of discretion for the BTR to refuse to hear the additional evidence and denied the taxpayer's motion for remand.⁷²⁰

705. *Id.*

706. *Id.* at 1054-55.

707. *Id.* at 1055.

708. 851 N.E.2d 399 (Ind. Tax Ct. 2006).

709. *Id.* at 400.

710. *Id.*

711. *Id.*

712. *Id.*

713. *Id.*

714. *Id.*

715. *Id.*

716. *Id.* at 400-01.

717. *Id.* at 401-02.

718. *Id.* at 402 (citing 52 IND. ADMIN. CODE 2-8-8(a) (2004)).

719. *Id.*

720. *Id.* at 403.

12. *O'Donnell v. Department of Local Government Finance*.⁷²¹—The taxpayers initiated an appeal of their 2002 real property assessment on October 1, 2005.⁷²² Their property was in a subdivision that straddles two different towns.⁷²³ Properties in each town were assessed at different rates and using different neighborhood factors.⁷²⁴ The taxpayers argued that their assessment was too high for a variety of reasons.⁷²⁵ First, they claimed that the subdivision should be assessed at a single rate and neighborhood factor.⁷²⁶ They also argued that an unfinished basement was inappropriately included in the living area of their home.⁷²⁷ Finally, they pointed to allegedly comparable properties in the subdivision that were assessed at lower values.⁷²⁸ The Tax Court dismissed all of these arguments because they did nothing to prove that the assessed value of the property was incorrect.⁷²⁹ The taxpayers only questioned the methodology used by the assessor, not the result of the assessment.⁷³⁰ The taxpayers did offer evidence of their 1997 home construction costs and their 2003 appraisal.⁷³¹ Had the taxpayers offered any trend analysis of these numbers that would indicate the relative value of the property in 1999, the evidence would have been probative.⁷³² However, the taxpayers suggested that the DLGF should make the calculations required to trend the numbers to 1999, a calculation that it makes every day.⁷³³ The Tax Court disagreed, reminding the taxpayers of their “duty to walk the Indiana Board and [the] Court through every element of its analysis.”⁷³⁴

The Court dismissed the taxpayers’ claim for failure to state a *prima facie* case.⁷³⁵

B. Inheritance Tax

1. *Estate of Young v. Indiana Department of State Revenue*.⁷³⁶—The estate initiated an action on April 15, 2005, appealing the probate court’s decision to

721. 854 N.E.2d 90 (Ind. Tax Ct. 2006).

722. *Id.* at 92.

723. *Id.*

724. *Id.* at 94 n.4.

725. *Id.*

726. *Id.*

727. *Id.*

728. *Id.*

729. *Id.* at 95.

730. *Id.*

731. *Id.*

732. *Id.*

733. *Id.* In fact, the taxpayer stated that he didn’t “need to hold the [BTR’s] hands.” *Id.*

734. *Id.* (quoting *Fid. Sav. & Loan v. Jennings County Assessor*, 836 N.E.2d 1075, 1082 (Ind. Tax Ct. 2005)).

735. *Id.*

736. 851 N.E.2d 393 (Ind. Tax Ct. 2006).

reject its amended inheritance tax return and claim for refund.⁷³⁷ The decedent was the life beneficiary of a trust that her husband had set up prior to his death in 1993.⁷³⁸ Her husband's estate elected QTIP treatment for that trust and computed its inheritance tax liability as if the assets in the trust were exempt from taxation as a marital transfer.⁷³⁹ The estate filed an initial inheritance tax return that included the assets of the trust as taxable property.⁷⁴⁰ The probate court accepted the return as filed and entered an order for the inheritance tax due.⁷⁴¹ The DOR filed a Petition for Rehearing, Reappraisement and Redetermination of Inheritance and Transfer Tax alleging that the estate had incorrectly classified several beneficiaries and paid too little tax as a result.⁷⁴² While the petition was pending, the estate filed an amended inheritance tax return and claim for refund alleging that the husband's estate had not made a valid QTIP election so it was responsible for paying any tax due on the trust assets.⁷⁴³ The estate also conceded that it had misclassified beneficiaries and that the inheritance tax would have to be adjusted to correct those errors.⁷⁴⁴ The probate court rejected the amended return and claim for refund and entered an order to correct the amount of inheritance tax due.⁷⁴⁵ The estate appealed the rejection of its claim for refund.⁷⁴⁶ The estate argued that the QTIP election made by the husband's estate was not valid because it was not written on a separate piece of paper from the inheritance tax return, it was not phrased in the proper tense, and didn't indicate an understanding that the election was irrevocable.⁷⁴⁷ The estate further argued that the decedent's trust was only subject to inheritance tax if the QTIP election made by the husband's estate was valid.⁷⁴⁸ The Tax Court rejected these arguments for two reasons. First, the husband's estate was closed almost thirteen years before this estate claimed that the QTIP election was invalid.⁷⁴⁹ The probate court determined at the time that the election was valid.⁷⁵⁰ The claim for refund by this estate amounted to an impermissible collateral attack on that judgment.⁷⁵¹ Second, the purpose of the marital deduction and the QTIP statutes was to allow property to pass from the first spouse to the surviving spouse without being taxed because it would be taxed in the estate of the surviving

737. *Id.* at 395.

738. *Id.* at 394.

739. *Id.*

740. *Id.*

741. *Id.*

742. *Id.*

743. *Id.* at 395.

744. *Id.* at 395 n.1.

745. *Id.* at 395.

746. *Id.*

747. *Id.* at 397.

748. *Id.*

749. *Id.*

750. *Id.*

751. *Id.*

spouse.⁷⁵² The Tax Court held that the validity of the QTIP election was now moot and that the assets of the trust would be subject to taxation as part of the decedent's estate.⁷⁵³

2. *Indiana Department of State Revenue v. Estate of Pickerill*.⁷⁵⁴—The DOR initiated an action on January 31, 2006, appealing a probate court decision that allowed the estate to calculate its inheritance tax obligation according to the terms of a family settlement agreement rather than the terms of the will.⁷⁵⁵ The decedent's will left his estate to his three sons from a prior marriage.⁷⁵⁶ His wife was not a beneficiary.⁷⁵⁷ After the will was admitted to probate, the wife and the three sons negotiated a family settlement agreement that transferred a substantial portion of the estate to the wife in exchange for her waiver of her statutory right to take against the will.⁷⁵⁸ The sons divided the remaining portion of the estate and waived their claims against the estate, except the right to claims against the estate for costs of administering the estate.⁷⁵⁹ The estate filed an amended inheritance tax return claiming that the property transferred to the wife was non-taxable because it was a transfer to a surviving spouse under I.C. § 6-4.1-3-7(a).⁷⁶⁰ The probate court accepted the amended return as filed and determined the amount inheritance tax the estate owed.⁷⁶¹ The DOR filed a Motion for Rehearing, Reappraisal and Redetermination of Inheritance and Transfer Tax with the probate court.⁷⁶² In its supporting brief, the DOR argued that under I.C. § 29-1-9-1, inheritance tax should be calculated on distributions under the terms of the will, not under the terms of the family settlement agreement.⁷⁶³ The DOR's counsel did not show up for the hearing.⁷⁶⁴ The estate argued that I.C. § 29-1-9-1 only applied in cases where a will contest or other claim or dispute was filed with the probate court.⁷⁶⁵ The probate court found in favor of the estate and denied later motions from the DOR to continue the hearing that it had missed and to correct errors.⁷⁶⁶ The DOR initiated an appeal, arguing that the statute did apply even though there was no formal controversy or contest between the family members.⁷⁶⁷ Reviewing the probate court's order

752. *Id.* at 397-98.

753. *Id.* at 398.

754. 855 N.E.2d 1082 (Ind. Tax Ct. 2006).

755. *Id.* at 1084.

756. *Id.* at 1083.

757. *Id.*

758. *Id.*

759. *Id.*

760. *Id.*

761. *Id.* at 1083-84.

762. *Id.* at 1084.

763. *Id.*

764. *Id.*

765. *Id.*

766. *Id.*

767. *Id.*

under a *de novo* standard, the Tax Court agreed with the DOR's argument.⁷⁶⁸ It found that the language of the statute and the commentary to it clearly covered any differences between parties with an interest in an estate, whether or not the difference resulted in litigation.⁷⁶⁹ The statute provides that family settlement agreements like this one are binding on all parties but may not "in any way impair the rights of creditors or of taxing authorities."⁷⁷⁰ A family settlement agreement is a transfer of property rights between parties other than the decedent that takes place after a death.⁷⁷¹ Inheritance tax, however, is based on the transfers that take place at death from the decedent to the beneficiaries.⁷⁷² A family settlement agreement cannot change the way that inheritance tax is calculated.⁷⁷³ The Tax Court reversed the probate court's judgment that the statute did not apply and remanded the case for recalculation of the inheritance tax due.⁷⁷⁴

3. *Estate of Dunnick v. Indiana Department of State Revenue*.⁷⁷⁵—The estate initiated an action on April 1, 2005, in response to a probate court order denying a marital deduction for all assets transferred to the decedent's wife.⁷⁷⁶ At his death, the decedent was married, with three sons from a prior marriage.⁷⁷⁷ The wife was not a beneficiary of the decedent's will or of an *inter vivos* trust that he had created before their marriage.⁷⁷⁸ She filed a petition for her statutory allowance and an election to take against the will with the probate court.⁷⁷⁹ The estate objected to the petitions, claiming that a prenuptial agreement barred the wife's claims against the estate.⁷⁸⁰ The estate reached a settlement with the wife who then withdrew her election claims.⁷⁸¹ Under the terms of the settlement, the wife received more than twice as much as she would have received if she had pursued her statutory allowance and election to take against the will.⁷⁸² The estate filed an amended inheritance tax return that treated the entire amount transferred to the wife as non-taxable because of the marital deduction.⁷⁸³ The DOR filed a Petition for Rehearing, Reappraisement and Redetermination of Inheritance and Transfer Tax, arguing that any settlement could not impair its

768. *Id.*

769. *Id.* at 1085-86.

770. *Id.* at 1085 (quoting IND. CODE § 29-1-9-1 (2004)).

771. *Id.*

772. *Id.* at 1085-86.

773. *Id.* at 1086.

774. *Id.*

775. 855 N.E.2d 1087 (Ind. Tax Ct. 2006).

776. *Id.* at 1090.

777. *Id.* at 1088.

778. *Id.*

779. *Id.*

780. *Id.*

781. *Id.*

782. *Id.*

783. *Id.*

taxing ability pursuant to I.C. § 29-1-9-1.⁷⁸⁴ Therefore, the estate should have calculated its inheritance tax by including only the value of the assets that the wife would have received under her election claim in the marital deduction.⁷⁸⁵ The estate appealed the order of the probate court.⁷⁸⁶ The estate challenged the probate court's jurisdiction to hear the DOR's petition claiming that it was not timely filed and that it failed to state specific grounds for requesting a rehearing.⁷⁸⁷ The DOR filed its petition on a Monday, two days after the calculated deadline, which fell on a Saturday.⁷⁸⁸ However, Indiana Trial Rule 6(A) extends deadlines that would otherwise end on a day when the courts are closed to the following business day.⁷⁸⁹ The DOR filed its petition on the first business day after the end of the deadline period and it was therefore timely filed.⁷⁹⁰ The Tax Court also held that the petition was not required to state specifically that the application of I.C. § 29-1-9-1 was at issue because the petition did give the estate sufficient notice that it would have to explain how it calculated its inheritance tax obligation.⁷⁹¹ The estate also challenged the applicability of I.C. § 29-1-9-1 to this case, claiming that the statute did not reach settlement agreements involving inter vivos trusts, prenuptial agreements, and elections.⁷⁹² However, the Tax Court found that the wife was attempting to establish her rights to the estate as an heir, as listed in I.C. § 29-1-9-1(c).⁷⁹³ Such settlement agreements cannot reduce the taxing authority of the DOR.⁷⁹⁴ The estate argued, in the alternative, that the wife's elections could have reached the trust assets, so the settlement agreement actually increased the amount of tax that the DOR could collect because it reduced the amount of assets that were transferred to the wife.⁷⁹⁵ The Tax Court could not address the issue of whether or not her elections could have reached the trust assets because the estate did not raise the issue with the probate court.⁷⁹⁶ However, the Tax Court did note that avoiding a reduction in inheritance taxes was only one purpose of I.C. § 29-1-9-1.⁷⁹⁷ To argue that the statute would allow settlement agreements to alter the imposition of inheritance taxes as long as the taxes were increased would be unjust and unfair to the taxpayers.⁷⁹⁸ The statute must apply equally to all

784. *Id.* at 1090.

785. *Id.*

786. *Id.*

787. *Id.* at 1091.

788. *Id.*

789. *Id.*

790. *Id.*

791. *Id.* at 1092.

792. *Id.* at 1093.

793. *Id.*

794. *Id.*

795. *Id.*

796. *Id.* at 1094 n.10.

797. *Id.* at 1094.

798. *Id.*

settlement agreements that would otherwise alter the imposition of inheritance tax.⁷⁹⁹

*C. Riverboat Wagering Tax: RDI/Caesars Riverboat Casino, LLC
v. Indiana Department of State Revenue*⁸⁰⁰

On September 3, 2004, Caesars appealed the calculation of its Riverboat Wagering Tax (RWT) for July 1, 2002, through June 30, 2003.⁸⁰¹ The opinion was on Caesar's motion for summary judgment, filed on January 27, 2000.⁸⁰² In 2002, the GA legalized flexible scheduling for riverboat casinos beginning July 1, 2002.⁸⁰³ The same legislation implemented a graduated tax rate on the adjusted gross receipts of those riverboats that chose to implement flexible scheduling.⁸⁰⁴ Riverboats that did not implement flexible scheduling continued to pay a flat rate of tax on their adjusted gross receipts.⁸⁰⁵ The 2002 legislation originally applied the graduated tax rates to adjusted gross receipts beginning with the date that the casino implemented flexible scheduling.⁸⁰⁶ Caesars implemented flexible scheduling on August 1, 2002.⁸⁰⁷ Based on the 2002 statute, Caesars calculated its RWT for July 2002 at the flat tax rate.⁸⁰⁸ Then, it began calculating the tax for the remaining eleven months according to the new graduated tax rates based solely on the adjusted gross receipts earned during those eleven months.⁸⁰⁹ In 2003, the GA retroactively amended the statute to more clearly state how taxes should be calculated when a riverboat implemented flexible scheduling for only part of a year.⁸¹⁰ The DOR recalculated Caesars's tax liability using the amended statute and issued a proposed assessment to Caesars.⁸¹¹ Caesars argued that the amendment imposed the graduated tax rates on a riverboat for an entire year, even when a riverboat had implemented flexible scheduling for only part of the year.⁸¹² However, the Tax Court referred to the plain language of the statute and to a companion non-code provision to explain its interpretation of the amended statute.⁸¹³ When a riverboat began or ended flexible scheduling in the middle of a tax year, the appropriate graduated tax rate tier would be calculated using

799. *Id.*

800. 854 N.E.2d 957 (Ind. Tax Ct. 2006), *trans. denied* (Ind. Feb. 22, 2007).

801. *Id.* at 958-59.

802. *Id.*

803. *Id.* at 958.

804. *Id.* at 959-60.

805. *Id.* at 959.

806. *Id.* at 960 (quoting IND. CODE § 4-33-13-1.5 (2005)).

807. *Id.* at 958.

808. *Id.* at 960.

809. *Id.*

810. *Id.* at 960-61.

811. *Id.* at 958, 962.

812. *Id.* at 962.

813. *Id.* at 963-65.

adjusted gross receipts from the entire year.⁸¹⁴ However, the graduated tax rate would only apply when flexible scheduling was in effect.⁸¹⁵ The flat tax rate would continue to apply when the riverboat did not use flexible scheduling.⁸¹⁶ Based on this interpretation of the statute, the Tax Court denied Caesars's motion for summary judgment and granted summary judgment to the DOR.⁸¹⁷

814. *Id.*

815. *Id.*

816. *Id.*

817. *Id.*

RECENT DEVELOPMENTS IN INDIANA TORT LAW

ANN L. THRASHER PAPA*

This Article discusses developments in tort law in Indiana during the survey period, October 1, 2005 through September 30, 2006. However, this Article does not attempt to contain either a comprehensive or exhaustive examination of all tort cases decided during the survey period.

I. NEGLIGENCE

A. *Duty of Care*

In *Cox v. Northern Indiana Public Service Co.*,¹ the Indiana Court of Appeals addressed a question of whether a utility that allowed its utility poles to be utilized by other companies, owed a duty to a cable installer who was shocked while working on the utility pole. The installer fell to the ground, suffered electroshock burns to his shoulders and back, and sustained exit wounds to his knees as well as other injuries related to his fall.² The utility was Northern Indiana Public Service Company (“NIPSCO”) and the cable installer was Wendell Cox (“Cox”). Cox installed cable for Jake’s Cable, a contractor for Mediacom, that had pole usage agreements with NIPSCO.

The court recited the three elements of negligence as “(1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff resulting from the defendant’s breach.”³ Additionally, the court restated the Webb test which requires that the following be examined and balanced to determine whether a duty exists: “(1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns.”⁴ The court pointed out, though, that the Webb test is inapplicable when the duty of element has been declared or otherwise established under a different test, such as in this case.⁵

The court found that NIPSCO’s duty was established by the pole sharing agreement between NIPSCO and Mediacom. NIPSCO “only had a duty to keep its poles and power lines from malfunctioning, a condition of which cable installers would likely be unaware.”⁶ Therefore, the court stated that “whether there was a malfunction determines the applicable law.”⁷ Finding that the only evidence of a possible malfunction was from one of Cox’s interrogatory answers, which were later contradicted during his deposition, the court held that Cox

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1. 848 N.E.2d 690 (Ind. Ct. App. 2006).

2. *Id.* at 694.

3. *Id.* at 696 (citing *Cox v. Stoughton Trailers, Inc.*, 837 N.E.2d 1075, 1079 (Ind. Ct. App. 2005)).

4. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)).

5. *Id.* (citing *N. Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003)).

6. *Id.* at 697.

7. *Id.* at 698.

“failed to raise a question of fact regarding NIPSCO’s duty to him. The trial court properly granted summary judgment to NIPSCO.”⁸

Another case examining the element of duty was *Paniaguas v. Endor, Inc.*,⁹ in which the court of appeals affirmed the trial court’s dismissal of the plaintiffs’ negligence and breach of contract claims.¹⁰ In this case, the plaintiffs were property owners in a housing development. The plaintiffs each purchased lots from Aldon Companies, Inc. (“Aldon”), which stimulated covenants and use restrictions for the lots. Aldon thereafter sold its rights and obligations to Endor, Inc. (“Endor”). Plaintiffs complained that Endor subsequently developed homes at a lower quality level than those constructed by Aldon, thus diminishing the value of their homes.¹¹

The plaintiffs’ tort claim alleged that Aldon “was negligent in failing to adequately protect [the plaintiffs’] interests via the real covenants when the obligations were assigned to Endor.”¹² Specifically, the plaintiffs argued “that Aldon had a duty to ensure that its successor developer, Endor, would adequately adhere to the restrictive covenants that applied to the subdivision.”¹³ The trial court thereafter granted Aldon’s motion to dismiss the complaint for failure to state a claim. The court of appeals agreed.

In making its determination, the court of appeals looked to an analogous Indiana Supreme Court case wherein the supreme court held that “[i]f that duty arises from a contract, then ‘tort law should not interfere.’”¹⁴ Furthermore, “damages recoverable in tort from negligence in carrying out the contract will be for injury to person or physical damage to property, and thus ‘economic loss’ will usually not be recoverable.”¹⁵

The court of appeals examined the relationship between the plaintiffs and Aldon, determined whether the type of alleged harm was reasonably foreseeable and balanced public policy concerns. First, the court found that the plaintiffs and Aldon had a purely contractual relationship.¹⁶ Second, the court found that Aldon would not likely have had the knowledge to be able to foresee any possible harm to the existing lot owners.¹⁷ Lastly, public policy considerations fell in favor of Aldon. The court found that the plaintiffs still had an opportunity for relief in contract law, and if an additional cause of action came under tort law, an injured party could “simultaneously hold the current developer and any prior

8. *Id.*

9. 847 N.E.2d 967 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 593 (Ind. 2006).

10. *Id.* at 973-74.

11. *Id.* at 969.

12. *Id.*

13. *Id.* at 970.

14. *Id.* (quoting *Greg Allen Constr. Co. v. Estelle*, 798 N.E.2d 171, 172 (Ind. 2003)).

15. *Id.* (quoting *Greg Allen Constr.*, 798 N.E.2d at 175); *see also* *Essex v. Ryan*, 446 N.E.2d 368, 373 (Ind. Ct. App. 1983).

16. *Paniaguas*, 847 N.E.2d at 970-71.

17. *Id.* at 971.

developer liable for a single wrong[.]”¹⁸

B. Causation

A viable claim of negligence requires causation. A defendant cannot be held liable for negligence if his actions did not at least proximately cause a plaintiff’s alleged injuries.¹⁹ In *Hellums v. Raber*,²⁰ the Indiana Court of Appeals examined the proximate cause element in the context of a hunting accident.

In *Hellums*, the court of appeals reversed the trial court’s grant of summary judgment in favor of Alan Raber (“Raber”), who was at the scene of the shooting but was not the hunter who shot Charles Hellums (“Hellums”). Hellums and Raber were hunting deer on the same property, but were with different parties. At the time of the incident, Hellums was on the opposite side of a deer that Raber’s party was hunting. Hellums was struck by a bullet which was not Raber’s.²¹ Hellums sued three of the hunters in Raber’s party, including Raber, alleging negligence in “failing to ascertain the presence of other hunters before shooting.”²² Raber filed a summary judgment motion arguing that he did not proximately cause Hellums’s injuries because he was not the person who shot Hellums.²³ The trial court agreed with Raber and granted his motion for summary judgment.

The court recited general rules examining proximate cause and found that “[t]he proximate cause of an injury is not merely the direct or close cause, rather it is the negligent act which resulted in an injury which was the act’s natural and probable consequence in light of the circumstance and should reasonably have been foreseen and anticipated.”²⁴ Furthermore, the court found that there may be more than one proximate cause of an injury and explained that summary judgment is rarely appropriate for a negligence claim because the decision about proximate cause is a fact question.²⁵

After determining that there was no Indiana case on point, the court examined Restatement (Second) of Torts section 876, as urged by Hellums. This section explained the circumstances under which a person is subject to liability for harm to a third person.²⁶ The court agreed with Hellums and held that “it is possible that [Raber’s] shooting in Hellums’s direction may have encouraged [the person who shot Hellums] to shoot or believe it was safe to shoot in that

18. *Id.*

19. *Cox v. N. Ind. Pub. Serv. Co.*, 848 N.E.2d 690, 696 (Ind. Ct. App. 2006).

20. 853 N.E.2d 143 (Ind. Ct. App. 2006).

21. *Id.* at 145.

22. *Id.*

23. *Id.*

24. *Id.* at 146 (quoting *Indianapolis Hous. Auth. v. Pippin*, 726 N.E.2d 341, 346 (Ind. Ct. App. 2000)).

25. *Id.* (citing *Indianapolis Hous. Auth.*, 726 N.E.2d at 346; *Correll v. Ind. Dep’t of Transp.*, 783 N.E.2d 706, 707 (Ind. Ct. App. 2002)).

26. *Id.*

direction, and therefore, there is a genuine issue of material fact as to whether [Raber's] actions were a proximate cause of [Hellums's] injuries."²⁷

The court then explained what Hellums would need to show to prove that Raber's actions were a proximate cause of Hellums's injuries. The court stated that it adopted the Restatement approach as applied to the facts of the case and explained that Hellums must prove that (1) Raber was acting negligently, (2) it was reasonably foreseeable that Raber's actions encouraged the other hunter to act negligently, and (3) Raber's encouragement was a proximate cause of Hellums's injuries.²⁸

In another case addressing causation, *Topp v. Leffers*,²⁹ the Indiana Court of Appeals affirmed the trial court's ruling that the plaintiff had not proven causation sufficiently to overcome a motion for directed verdict. In this case, Yvonne Topp ("Topp") sought damages for aggravation of her preexisting injuries, alleging that Sarah Leffers ("Leffers") committed negligence when she rear-ended Topp's vehicle.³⁰

After the accident, Topp met with Dr. Schreier, who treated Topp approximately ten (10) times. Dr. Schreier wrote that Topp "appear[ed] to have occipital neuralgia from a motor vehicle accident."³¹ Over one year after Topp filed her complaint against Leffers, Dr. Mark Reecer conducted an independent medical examination of Topp and reviewed her medical records. Dr. Reecer wrote that Topp "may have had an aggravation of her preexisting spine complaints."³² Additionally, during his deposition, Dr. Reecer testified that while it appeared that Topp did have some impairment, he could not relate the impairment to the present accident specifically.³³ Neither doctor "testified at the trial, but Dr. Reecer's deposition and written report were entered into evidence as were Dr. Schreier's medical records regarding Topp."³⁴

"After Topp rested, Leffers moved for a directed verdict arguing that she had not presented sufficient evidence to prove the causation element of her negligence claim because she had not introduced expert medical testimony to demonstrate that her injuries were caused by the November 2000 accident."³⁵ The trial court granted Leffer's motion for a directed verdict, finding that causation was lacking because there was no evidence from a doctor "that says that the patient presents with pain and I believe her injuries were causally connected to a reasonable degree of medical certainty to the accident in question."³⁶ The trial court also denied Topp's motion to correct errors and

27. *Id.* at 147.

28. *Id.*

29. 838 N.E.2d 1027 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 998 (Ind. 2006).

30. *Id.* at 1029-30.

31. *Id.* at 1029 (quoting Appellant's App. at 155).

32. *Id.* at 1030 (citing Appellant's App. at 149-50).

33. *Id.* (citing Appellant's App. at 210).

34. *Id.*

35. *Id.*

36. *Id.* at 1031.

found that even Topp's own testimony combined with the evidence from the doctors "[did] not rise to the level of reasonable medical certainty or probability" and therefore proximate cause was still lacking.³⁷

On appeal, Topp argued that her testimony alone was sufficient to place the case before a jury.³⁸ The court of appeals, however, found that "in order for Topp to carry her burden on the element of causation, it was necessary for her to introduce the testimony of an expert medical witness on this issue" because Topp's injuries were subjective in nature, meaning her injury is not directly observable by a doctor.³⁹ Additionally, because her complaint against Leffers was for aggravation of injuries, Topp needed a medical expert to explain the causal connection between the accident at issue and the prior accidents and injuries.⁴⁰

Along these same lines, the evidence and testimony of Drs. Schreier and Reecer were not sufficient to sustain Topp's burden on the causation element either. As the court explained, "they lack reasonable medical certainty."⁴¹ Both doctors used language that was "couched in terms less than that of a reasonable degree of medical certainty."⁴² The trial court also was not convinced that Topp's testimony in conjunction with the doctors' opinions was sufficient to prove causation.⁴³

C. Negligent Supervision

During the survey period, the Indiana Court of Appeals decided two (2) cases involving negligent supervision. The first case, *Doe v. Lafayette School Corp.*,⁴⁴ involved a sexual relationship between a high school student ("Doe") and her teacher.⁴⁵ This civil case was filed against Lafayette School Corporation ("LSC"), the superintendent, and other Jefferson High School officials. Doe claimed that because the defendants were negligent in monitoring the teacher's contact with the students, she suffered emotional distress. Doe alleged that the school corporation and the officials were negligent in handling the matter of the teacher's contact with students after they had knowledge of the problem. Therefore, she argued, the acts and omissions of the defendants were a breach of their duty of care and supervision to her "and were 'a direct and proximate cause of [her] pain, suffering, emotional distress, humiliation, embarrassment and

37. *Id.* (citing Brief of Yvonne Topp at 8).

38. *Id.* at 1033.

39. *Id.* (citing *Daub v. Daub*, 629 N.E.2d 873 (Ind. Ct. App. 1994)).

40. *Id.* (citing *Daub*, 629 N.E.2d at 877-78).

41. *Id.* at 1034.

42. *Id.* at 1033 (citing *Colaw v. Nicholson*, 450 N.E.2d 1023, 1030 (Ind. Ct. App. 1983)).

43. *Id.* at 1036.

44. 846 N.E.2d 691 (Ind. Ct. App. 2006).

45. The teacher was convicted of child seduction and engaging in deviate sexual conduct. *Id.* at 695.

mental anguish.”⁴⁶

The appeal involved only the trial court’s grant of summary judgment in favor of LSC. In order for LSC to prevail on a motion for summary judgment in a negligence action, LSC had to “demonstrate that the undisputed material facts negate at least one of the elements essential to plaintiff’s claim or that the claim is barred by an affirmative defense.”⁴⁷ Furthermore, as in most negligence decisions involving summary judgment, the court of appeals recited that summary judgment is rarely appropriate for negligence cases.⁴⁸

On appeal, the court of appeals first found that the duty element of Doe’s complaint of negligence was satisfied. It held that LSC did in fact owe Doe a “general duty of reasonable care and supervision[.]”⁴⁹ The court of appeals next found that whether LSC breached its duty of care was more appropriately a question for the trier of fact because “reasonable persons could differ as to whether there is a sufficient relationship between LSC’s general duty to supervise its students and its failure to follow up on the concerns about [the teacher’s] email use with his students.”⁵⁰

The court of appeals also found that LSC was the proximate cause of Doe’s alleged injuries related to her being questioned by a security guard and without a parent present.⁵¹ The “trickier question” for the court of appeals was whether LSC was the proximate cause of Doe’s injuries caused by the teacher’s conduct.⁵² This question, the court of appeals held, was a question of fact appropriate for a jury’s determination.⁵³

The second case involving a claim of negligent supervision decided by the Indiana Court of Appeals during the survey period, *Davis v. LeCuyer*,⁵⁴ involved a jet ski accident on Geist Reservoir. In this case, two boys were driving jet skis owned by one of the boy’s parents. At one point during the boys’ outing on the

46. *Id.* at 695-96 (citing Appellant’s App. at 30).

47. *Id.* at 698 (citing *McClyde v. Archdiocese of Indianapolis*, 752 N.E.2d 229, 232 (Ind. Ct. App. 2001)).

48. *Id.*

49. *Id.* at 699 (citing *Mangold ex rel. Mangold v. Ind. Dept. of Nat’l Res.*, 756 N.E.2d 970, 975 (Ind. 2001); *Roe v. N. Adams Cmty. School Corp.*, 647 N.E.2d 655, 660 (Ind. Ct. App. 1995)). The court of appeals did state that the fact that the sexual acts occurred off of school property “may have a bearing on the foreseeability component of proximate causation[.]” *Id.* (citing *Mangold*, 756 N.E.2d at 975).

50. *Id.* at 700.

51. *Id.* at 701.

52. *Id.*

53. *Id.* (citing *Peters v. Forster*, 804 N.E.2d 736, 743 (Ind. 2004) (quoting *Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10, 15 (Ind. 1982))). The court of appeals also held that Doe is “free to claim damages for emotional distress” after prevailing on her negligence claim. *Id.* (citing *Ryan v. Brown*, 827 N.E.2d 112, 118 (Ind. Ct. App. 2005)). And lastly, the court of appeals affirmed the trial court’s “conclusion that LSC is not vicariously liable for the acts of its employee, [the teacher], under this set of facts.” *Id.* at 702.

54. 849 N.E.2d 750 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 596 (Ind. 2006).

reservoir, Benton LeCuyer (“Benton”) made a sharp turn on his jet ski in front of the jet ski being operated by his friend Doug Davis (“Doug”). The collision between the two (2) jet skis resulted in a serious leg injury to Benton.⁵⁵ The complaint in this case alleged that Doug was negligent in operating the jet ski he was driving⁵⁶ and Doug’s parents were negligent in instructing and supervising the boys on the use and operation of the jet skis.⁵⁷

Doug’s parents filed a motion for summary judgment, which the trial court denied. Doug’s parents then filed a motion either for reconsideration or certification for interlocutory appeal. The motion to reconsider was denied and motion to certify was granted.⁵⁸

As to the allegation of negligent supervision of Doug and Benton, Doug’s parents argued on appeal that they were entitled to summary judgment. Doug’s parents argued

that the standard of care that applies “between voluntary co-participants in recreational and sporting activities” is recklessness, rather than negligence. They then argue that they are entitled to summary judgment on the LeCuyers’ claims, as no evidence was presented to the trial court that Doug acted intentionally or recklessly while operating the jet ski.⁵⁹

After denying summary judgment in favor of Doug’s parents, the trial court certified the question “whether negligent supervision is ‘a separate tort in the State of Indiana as to which a person may be liable to a minor in his care.’”⁶⁰ The court initially observed “that there is a well-recognized duty in tort law that persons entrusted with children have a duty to supervise their charges.”⁶¹

The court first found Doug’s parents’ *in loco parentis* argument unpersuasive because the cases they cited and referred to only dealt with “supervision a parent owes with regard to the conduct of his or her own child.”⁶² Based upon previous holdings,⁶³ the court held that “Indiana law recognizes negligent supervision of a minor in one’s care as a separate tort[,]” and material fact issues remained with regard to their supervision of Benton.⁶⁴

55. *Id.* at 752.

56. The opinion addresses this issue as well as the negligent supervision claim, but for the purposes of this article, only the negligent supervision aspects of the court’s order are discussed.

57. *Davis*, 849 N.E.2d at 752.

58. *Id.*

59. *Id.*

60. *Id.* at 756 (citing Appellant’s App. at 314).

61. *Id.* at 757 (citing *Wells v. Hickman*, 657 N.E.2d 172, 179 (Ind. Ct. App. 1995)).

62. *Id.*

63. *Id.* (citing *Johnson v. Pettigrew*, 595 N.E.2d 747, 753 (Ind. Ct. App. 2006); *Illinois Farmers Ins. Co. v. Wiegand*, 808 N.E.2d 180 (Ind. Ct. App. 2004)).

64. *Id.*

D. Comparative Fault Act and Risk

In *Bowman v. McNary*,⁶⁵ a high school student, Kelsey Bowman (“Bowman”) sued the Tippecanoe School Corporation, the Tippecanoe School Corporation Board of Trustees (collectively “the School Corporation”), and a fellow student, Alycea McNary (“McNary”), for negligence based upon an incident when the two (2) girls were practicing for their high school golf team and McNary’s golf club struck Bowman during a practice swing, causing Bowman to be blind in one eye.⁶⁶ Although the opinion discussed negligence and recklessness, only the discussion of incurred risk will be addressed in this article.

“[T]here is ‘a duty on the part of school personnel to exercise ordinary and reasonable care for the safety of the children under their authority.’”⁶⁷ Nevertheless, the court found that the “Comparative Fault Act does not apply to the School Corporation, a governmental entity[,]” and therefore, the rule that “incurred risk” can be a complete defense to a negligence claim “does not apply to the School Corporation.”⁶⁸

Therefore, the key determination involved whether Bowman incurred the risk of her injury. “Incurred risk is a conscious, deliberate, and intentional embarkation upon a course of conduct with knowledge of the circumstances.”⁶⁹ The required analysis looks to the subjective thoughts of the actor and her knowledge and acceptance of the risk,⁷⁰ but does not require “precise foresight that the particular accident and injury that in fact occurred was going to occur.”⁷¹ After a review of the facts, the court held that Bowman had actual knowledge of the risk of being at a driving range and she voluntarily accepted the risk.⁷² The trial court ruled that Bowman could not pursue a negligence claim against the School Corporation. The court of appeals agreed.

In *Funston v. School Town of Munster*,⁷³ the Indiana Supreme Court decided a case involving a spectator who was injured on bleachers at a public school. Howard Funston (“Funston”) fell backward off of bleachers at Munster High School gymnasium while watching his son play Amateur Athletic Union (AAU) basketball. The school provided the bleachers to AAU by agreement and were

65. 853 N.E.2d 984 (Ind. Ct. App. 2006).

66. *Id.* at 987.

67. *Id.* at 997 (quoting *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 553 (Ind. 1987)).

68. *Id.* (citing IND. CODE § 34-51-2-2 (2004); *Heck v. Robey*, 659 N.E.2d 498, 504 n.8 (Ind. 1995)).

69. *Id.* (citing *Beckett*, 504 N.E.2d at 554).

70. *Id.* (citing *Beckett*, 504 N.E.2d at 554).

71. *Id.* (citing *Mauller v. City of Columbus*, 552 N.E.2d 500, 503 n.3 (Ind. Ct. App. 1990)).

72. *Id.* at 998. For another case decided during the survey period that briefly discusses inherent risk, see *Anderson v. Four Seasons Equestrian Center, Inc.*, 852 N.E.2d 576 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 599 (Ind. 2006), which is about horse training and a signed waiver with an exculpatory clause.

73. 849 N.E.2d 595 (Ind. 2006).

five-row, portable aluminum bleachers with no back on the top row.⁷⁴ The bleachers were not pushed against any walls.⁷⁵ In response to being sued, the school filed a motion for summary judgment arguing that Funston was contributorily negligent. The trial court agreed and granted the school's motion.⁷⁶

Because of Indiana's Comparative Fault Act,⁷⁷ the common law defense of contributory negligence is applicable to government defendants, and any small amount of negligence on the injured party's part will completely bar any action against the governmental entity for damages.⁷⁸ Contributory negligence results when "the plaintiff's conduct 'falls below the standard to which he should conform for his own protection and safety. Lack of reasonable care that an ordinary person would exercise in like or similar circumstances is the factor upon which the presence or absence of negligence depends.'"⁷⁹ Because contributory negligence is a question of fact, the court found that it is not ordinarily appropriate for summary judgment, unless the facts are undisputed and there can be only one inference therefrom.⁸⁰

In this case, it was undisputed that Funston fell off the bleachers when he leaned backward on the top row of bleachers that were not pushed against a wall.⁸¹ The supreme court held that, as a matter of law, Funston was negligent, that negligence was a proximate cause of his own injuries, and found that therefore, the trial court correctly applied the defense of contributory negligence in granting the school's motion for summary judgment.⁸²

In addition to two cases decided with contributory negligence analysis because the defendants were exempt from the comparative fault act by reason of them being schools, the court of appeals decided at least one case in which it applied comparative fault analysis, *Gregory & Appel Insurance Agency v. Philadelphia Indemnity Insurance Co.*⁸³

In this case, one issue was whether the trial court properly allowed the jury

74. *Id.* at 598.

75. *Id.*

76. *Id.*

77. IND. CODE § 34-51-2-2 (2004).

78. *Funston*, 849 N.E.2d at 598.

79. *Id.* at 598-99 (quoting *Jones v. Gleim*, 468 N.E.2d 205, 207 (Ind. 1984)); *see also* *Hundt v. La Crosse Grain Co.*, 446 N.E.2d 327, 329 (Ind. 1983).

80. *Id.* at 599 (citing *Butler v. City of Peru*, 733 N.E.2d 912, 917 (Ind. 2000); *Jones*, 468 N.E.2d at 207).

81. *Id.*

82. *Id.* at 600. Justice Rucker dissented stating that the facts of this case should have precluded summary judgment. His dissent relies both on the general rule that negligence should rarely be dismissed by summary judgment and because he found the facts of this case to be such that he believed the jury should decide whether more than one inference could be made and whether Funston's alleged negligence was a proximate cause of his injuries. *Id.* at 601 (Rucker, J., dissenting).

83. 835 N.E.2d 1053 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1005 (Ind. 2006).

to reduce Philadelphia Indemnity Insurance Company's ("Philadelphia") award by the percentage of fault it attributed to a non-party.⁸⁴ The court found, "In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty."⁸⁵ Furthermore, "[t]he burden of proof for this defense lies with the defendant."⁸⁶

The jury's allocation of fault in this matter was 0% to Philadelphia, 7% to the non-party, and 93% to Gregory & Appel. Because the court found that the evidence in the record was sufficient to support a jury's determination that the non-party "was involved in Philadelphia's claim of negligent investigation and misrepresentation[,]"⁸⁷ it concluded that the jury did not err when it determined liability in this matter.

E. Infliction of Emotional Distress

In *Tucker v. Roman Catholic Diocese of Lafayette-in-Indiana*,⁸⁸ Debra Tucker ("Tucker") raised claims of breach of contract, promissory estoppel as a defense to statute of frauds, negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress with regard to her allegation that she was sexually abused as a child by her religion teacher, Harry Metzger ("Metzger"), a layperson hired by the Roman Catholic Diocese of Lafayette-in-Indiana ("the Diocese"). This Article will address the Indiana Court of Appeals' decision with regard to Tucker's tort claims.

Tucker alleges that she was sexually abused by Metzger beginning when she was ten (10) years old until she was twelve (12) years old, from 1966 to 1968. Tucker alleged "that the Diocese was negligent in failing to take disciplinary action against Metzger, in failing to warn parents and children, including Tucker, about Metzger, and in failing to report Metzger to authorities as required by law."⁸⁹ The court held that to the extent Tucker's negligence claim was based upon her abuse from 1966 to 1968, the claim was barred by the applicable two-year statute of limitations.⁹⁰ To the extent the claim was based upon harm caused by Metzger to other children, Tucker's claim failed because she lacked standing.⁹¹

The court found that negligent infliction of emotional distress "requires that the injured person suffered the injury either through direct impact or direct involvement."⁹² Because Tucker's claim of negligent infliction of emotional

84. *Id.* at 1055.

85. *Id.* at 1065 (quoting IND. CODE § 34-51-2-14 (2004)).

86. *Id.* at 1065-66 (citing IND. CODE § 34-51-2-15 (2004)).

87. *Id.* at 1066 (emphasis in original).

88. 837 N.E.2d 596 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1010 (Ind. 2006).

89. *Id.* at 602.

90. *Id.* (citing IND. CODE §34-11-2-4 (2004)).

91. *Id.* (citing *Villegas v. Silverman*, 832 N.E.2d 598, 604 (Ind. Ct. App. 2005)).

92. *Id.* (citing *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000); *Ryan v. Brown*, 827 N.E.2d 112, 122 (Ind. Ct. App. 2005)).

distress was based upon her time-barred claim of negligence, the court held that Tucker failed to state a claim for negligent infliction of emotional distress.

Lastly, the court concluded that an allegation of intentional infliction of emotional distress requires “conduct that is so extreme and outrageous as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.”⁹³ There has to be intent to emotionally harm someone.⁹⁴ The court held that although sexual abuse is extreme and outrageous, Tucker alleged that Meztger caused this harm. Tucker failed to allege that the Diocese had intent to cause her harm, thereby failing to state a valid claim.⁹⁵

In *Lachenman v. Stice*,⁹⁶ the Indiana Court of Appeals addressed claims of one dog owner (“Lachenman”) against another (“the Stices”) for negligent and intentional infliction of emotional distress when Lachenman’s dog was fatally injured by one of the Stices’ dogs. In this case, the trial court granted summary judgment in favor of the Stices on both claims of negligent and intentional infliction of emotional distress.

The court first recited the elements of intentional infliction of emotional distress, which require extreme and outrageous conduct and intent to harm the plaintiff.⁹⁷ The court stated, “The requirements to prove this tort are rigorous.”⁹⁸ Furthermore, the “conduct [must] exceed[] all bounds usually tolerated by a decent society and causes mental distress of a very serious kind.”⁹⁹ The court then held that based upon the facts of the case, the Stices’ behavior failed to meet the high standard of this tort and there was no proof that the Stices intended to cause Lachenman any emotional distress.¹⁰⁰

Next, with regard to Lachenman’s claim of negligent infliction of emotional distress, the court analyzed its decision under the “impact” rule,¹⁰¹ which has been evolving in Indiana case law for some time.¹⁰² Importantly, the court found that Lachenman was never directly physically impacted, and she conceded in her appellate brief that she never sustained any bodily harm from the Stices’ dogs. Therefore, the court held that Lachenman “fail[ed] to meet the requirements of the modified impact rule.”¹⁰³ The court further held that Lachenman’s position as dog owner does not position her into the bystander rule either. This rule

93. *Id.* at 603 (citing *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002)).

94. *Id.* (citing *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991)).

95. *Id.* (citing *Cullison*, 570 N.E.2d at 31).

96. 838 N.E.2d 451 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1008 (Ind. 2006).

97. *Id.* at 456.

98. *Id.* (citing *Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 523 (Ind. Ct. App. 2001)).

99. *Id.* at 457 (citing *Branham*, 744 N.E.2d at 523).

100. *Id.*

101. *Id.* (citing *Ryan v. Brown*, 827 N.E.2d 112, 119 (Ind. Ct. App. 2005)).

102. *See id.* at 457-60 (summarizing the impact rule and how it has evolved through case law).

103. *Id.* at 460.

allows persons to claim emotional distress when they witness severe injury to a “spouse, parent, child, grandparent, grandchild, or sibling[, and] ‘loved one[s] with a relationship to the plaintiff analogous’ to such persons.”¹⁰⁴ The court was unwilling to extend this definition to include pets, however.¹⁰⁵

F. Sudden Emergency Doctrine

In *Willis v. Westerfield*,¹⁰⁶ the Indiana Supreme Court determined that the sudden emergency doctrine is not an affirmative defense that must be pled in an answer or risk being waived by a defendant.¹⁰⁷ This case involved a rear-end vehicle collision in which Christopher Westerfield hit Ann Willis. Westerfield testified at his deposition that prior to the collision, Willis “suddenly and without warning changed lanes and applied her brakes at the intersection and that he was unable to stop his vehicle before it struck Willis’s vehicle because of wet pavement and Willis’s quick lane change.”¹⁰⁸

On appeal, Willis argued that Westerfield should have included the sudden emergency doctrine in a pleading as an affirmative defense pursuant to Indiana Trial Rule 8(C).¹⁰⁹ “In a negligence cause of action, the sudden emergency doctrine is an application of the general requirement that one’s conduct conform to the standard of a reasonable person.”¹¹⁰ The doctrine was created to show that someone who is confronted with an emergency, or sudden and unexpected circumstance, does not have to act as another would under normal circumstances.¹¹¹

Furthermore, “[a]n affirmative defense is a defense ‘upon which the proponent bears the burden of proof and which, in effect, admits the essential allegations of the complaint but asserts additional matter barring relief.’”¹¹² However, the sudden emergency “doctrine does not admit the allegations of the complaint but nevertheless excuse fault. Rather, it ‘defines the conduct to be expected of a prudent person in an emergency situation.’”¹¹³ Therefore, the court held that Indiana Trial Rule 8(C) did not bar the trial court giving the sudden emergency doctrine instruction despite it not being pled by Westerfield.¹¹⁴

104. *Id.* (citing *Groves v. Taylor*, 729 N.E.2d 569, 572 (Ind. 2000)).

105. *Id.* at 461.

106. 839 N.E.2d 1179 (Ind. 2006).

107. *Id.* at 1182 (citing IND. T.R. 8(C)).

108. *Id.* at 1182-83.

109. *Id.* at 1183.

110. *Id.* at 1184.

111. *Id.* (citing W.P. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 196 (5th ed. 1984)).

112. *Id.* at 1185 (quoting *Paint Shuttle, Inc. v. Continental Cas. Co.*, 733 N.E.2d 513, 524 (Ind. Ct. App. 2000)).

113. *Id.* at 1185-86 (quoting *Brooks v. Friedman*, 769 N.E.2d 696, 699 (Ind. Ct. App. 2002)).

114. *Id.* at 1186.

G. Journey's Account Statute

In *Basham v. Penick*,¹¹⁵ the Indiana Court of Appeals determined that the Journey's Account Statute, found at Indiana Code section 34-11-8-1, applied to the case to save Lori Basham's and Kentucky Farm Bureau Insurance's (collectively "Basham") complaint against Craig Penick ("Penick") despite it being filed after the statute of limitations had run. The Journey's Account Statute states in relevant part that if a plaintiff files suit but the suit fails for any reason other than negligent prosecution, the plaintiff may file a new suit not later than three (3) years after the determination in the first suit.¹¹⁶ Generally, this statute saves a suit that was dismissed for technical reasons.¹¹⁷

This case also involved a question of which statute of limitations applied to the original action, the determination of which would affect whether the Journey's Account Statute would save Basham's complaint. The court held,

in light of the broad and liberal purpose of the Journey's Account Statute, and the Supreme Court's admonition that the statute not be narrowly construed, we hold that, under the facts of this case, the timeliness of Basham's original complaint, for purposes of the Journey's Account Statute, is determined by Indiana's statute of limitations.¹¹⁸

In conclusion, the court reversed that part of the trial court's order granting Penick's motion for judgment on the pleadings.

II. LEGAL MALPRACTICE

A. Negligent Representation

In *Clary v. Lite Machines Corp.*,¹¹⁹ the Indiana Court of Appeals addressed the issues of proximate cause and the "attorney judgment rule." The court of appeals affirmed the trial court and held that the attorneys, BB & C, failed to research and argue a mitigation of damages issue raised by the defendants in a lawsuit in which BB & C represented Lite Machines Corporation ("Lite").¹²⁰ Additionally, the court held that because Indiana has not adopted the attorney judgment rule, BB & C were not relieved from its liability to Lite for failing to research the key issue of mitigation of damages.¹²¹

In December 1993, Lite, as represented by BB & C, filed a complaint against Techno, Inc. ("Techno") and Designatronics, Inc. (Designatronics"), alleging negligence and breach of warranty based upon a faulty milling and routing

115. 849 N.E.2d 706 (Ind. Ct. App. 2006).

116. *Id.* at 709.

117. *Id.* at 710.

118. *Id.* at 712.

119. 850 N.E.2d 423 (Ind. Ct. App. 2006).

120. *Id.* at 431.

121. *Id.* at 433.

machine Lite manufactured by Techno, which is a division of Designatronics.¹²² Lite sought damages of approximately four million dollars (\$4,000,000) for lost profits between 1992 and 1996.¹²³

At least a year prior to trial, Techno informed BB & C that it planned to raise the affirmative defense of mitigation of damages. Then, just prior to trial, Techno identified an expert witness who was going to testify on its behalf about mitigation of damages. Furthermore, Techno offered to make the expert witness available for deposition. BB & C basically never addressed the mitigation of damages issue. It did not depose Techno's expert witness, present rebuttal evidence as to the expert's testimony, cross-examine the expert, address the issue of mitigation of damages in Lite's pre-trial brief, or file a post-trial brief.¹²⁴

At the conclusion of the trial, the trial court found that although Lite had "sustained \$2,609,608 in net lost profits[,]"¹²⁵ it entered judgment against Techno and Designatronics in the amount of \$260,000 based upon Lite's failure to mitigate its damages.¹²⁶ BB & C did not research the issue of damage mitigation until it was preparing an appeal to the court of appeals of the trial court's denial of Lite's motion to correct errors. During this research, BB & C discovered that at least three cases existed that suggested that Lite would not have had to mitigate its damages.¹²⁷ This case law and the accompanying argument were not considered during the appeal because the court of appeals was limited to the evidence in the record.¹²⁸

After the trial court's judgment was affirmed, Lite filed suit against BB & C in December 2000.¹²⁹ A jury returned a verdict for Lite in the amount of \$3,612,574.00. After the trial court denied BB & C's motion to correct error and renewed motion to correct error, the current appeal ensued.¹³⁰

The court of appeals recited the elements of legal malpractice as: "(1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to exercise ordinary skill and knowledge (breach of the duty); and (3) that such negligence was the proximate cause of (4) damage to the plaintiff."¹³¹ Therefore, in this case, Lite had the burden to prove that "but for BB & C's failure to research and argue the issue of mitigation of damages before and/or during the *Techno* trial, Lite would have received a greater damages award."¹³²

BB & C's counter argument was that it should have been granted summary judgment "because there was no genuine issue of material fact regarding the

122. *Id.* at 428.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 429.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 430 (citing *Rice v. Strunk*, 670 N.E.2d 1280, 1283-84 (Ind. 1996)).

132. *Id.* at 430-31.

element of proximate cause.”¹³³ BB & C argued that Lite’s alleged bases for BB & C’s alleged negligence were nothing more than speculation.¹³⁴ Nevertheless, the court of appeals found that the trial court’s findings of fact, conclusions, judgment following the *Techno* trial, and subsequent findings showed that Lite’s failure to respond to Techno’s mitigation of damages argument directly resulted in a lesser damage award in Lite’s favor.¹³⁵ Therefore, the court of appeals held that the trial court properly denied BB & C’s motion for summary judgment.¹³⁶

In its appeal, BB & C also argued that the “attorney judgment rule” should have been applied to BB&C’s motion for summary judgment in its favor.¹³⁷ The “attorney judgment rule,” not adopted by Indiana, provides that “an attorney’s ‘mere errors in judgment’ cannot support a legal malpractice claim.”¹³⁸ Nevertheless, the court of appeals found that even if the “attorney judgment rule” had been adopted in Indiana and applied to this matter, it would not have supported BB & C’s motion for summary judgment because even in those states that do apply the rule, attorneys’ duties to their clients “encompass[] knowledge of the law and an obligation to perform diligent research and provide informed judgments.”¹³⁹ The court of appeals held that “the applicable law was settled, the BB & C attorneys failed to research the issue of Lite’s duty to mitigate its damages even after it was raised by opposing counsel prior to and during trial, and any of BB & C’s professional judgments on the issue were therefore uninformed and would not be entitled to immunity.”¹⁴⁰

B. Duty of Attorney for Receiver

In *KeyBank National Ass’n v. Shipley*,¹⁴¹ the Indiana Court of Appeals addressed issue of first impression, “whether an attorney for a receiver owes a duty to a creditor.”¹⁴² The court of appeals affirmed the trial court when it concluded that “a receiver’s attorney does not owe a duty to a creditor and therefore cannot be held liable for negligence. Instead, the creditor’s remedy is to sue the receiver, which in turn can sue its attorney for malpractice.”¹⁴³

The trial court in *Shipley* granted summary judgment for Grant Shipley (“Shipley”), the attorney for the receiver, and Stephen J. Michael (“Michael”) against KeyBank National Association (“KeyBank”), the creditor, based upon its

133. *Id.* at 431.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (citing *Simko v. Blake*, 532 N.W.2d 842, 847 (Mich. 1995)).

139. *Id.* at 432 (citing *Wright v. Williams*, 121 Cal. Rptr. 194, 199 (Ct. App. 1975); *Janik v. Rudy, Exelrod & Zieff*, 14 Cal. Rptr. 3d 751, 755 (Ct. App. 2004)).

140. *Id.* at 433.

141. 846 N.E.2d 290 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 591 (Ind. 2006).

142. *Id.* at 291.

143. *Id.*

conclusion that there was no privity between Shipley and KeyBank.¹⁴⁴ Essentially, KeyBank's argument on appeal was that it was a third-party beneficiary of the relationship between the receiver and Shipley; therefore, it had a right to directly sue Shipley for negligence.¹⁴⁵ The support for KeyBank's argument came from the third-party beneficiary contract theory adopted in Indiana: "a professional owes a duty to a plaintiff when that professional knew that the services were to be rendered for the benefit of the third party to the transaction."¹⁴⁶

The court of appeals held, however, that the privity exception set forth in previous Indiana cases does not apply to this matter because "Shipley and the receiver did not enter into an agreement with the intent to confer a direct benefit on KeyBank."¹⁴⁷ The receiver, in fact, owed a duty to all of the creditors, not only KeyBank.¹⁴⁸ Furthermore, part of the rationale of the privity exception is that the beneficiary has no one to recover against for negligence, which the court of appeals found was not the case in this matter.¹⁴⁹

In conclusion, after reviewing the only other case in the United States that found an attorney for a receiver liable to a creditor and determining that this case was limited in its application and no other states had followed suit,¹⁵⁰ the court of appeals affirmed the grant of summary judgment to Shipley.¹⁵¹ The court held that because the receiver in this matter owed a duty to all of the creditors, not just KeyBank, Shipley did not intend to confer a direct benefit on KeyBank and KeyBank was not left without a remedy.¹⁵² "KeyBank could have sued Michael, [the receiver,] whose actions were secured by a bond. Michael, in turn, could have sued Shipley for malpractice."¹⁵³

III. MEDICAL MALPRACTICE

During the survey period, the Indiana Supreme Court decided two medical malpractice cases involving statutes of limitations issues and one medical malpractice case involving a question of contributory negligence. The Indiana Court of Appeals also decided medical malpractice cases involving issues related to statutes of limitations, fraudulent concealment, validity of affidavits, effects

144. *Id.* at 295.

145. *Id.* at 296.

146. *Walker v. Lawson*, 514 N.E.2d 629, 633 (Ind. Ct. App. 1987), *adopted in part* by 526 N.E.2d 968 (Ind. 1988). Another case relying on *Walker*, and discussed by the court of appeals in this matter, is *Hermann v. Frey*, 537 N.E.2d 529 (Ind. Ct. App. 1989). *See Shipley*, 846 N.E.2d at 297.

147. *Shipley*, 846 N.E.2d at 297.

148. *Id.*

149. *Id.*

150. *See id.* at 298-99 (discussing *Prescott v. Coppage*, 296 A.2d 150 (Md. 1972)).

151. *Id.* at 300.

152. *See id.* at 299.

153. *Id.* at 301.

of medical release, and proximate cause.¹⁵⁴ Some of these cases will be discussed herein.

A. *Statutes of Limitations*

In February 2006, the Indiana Supreme Court decided a medical malpractice case which involved the application of a statute of limitations when the injured party is a minor.¹⁵⁵ Then, in May 2006, the Indiana Supreme Court decided a medical malpractice case involving the application of a statute of limitations when the injured party is a minor who has died.¹⁵⁶

In *Ledbetter*, plaintiff sought damages for serious and permanent physical and mental injuries to a child arising from birth complications in November 1974.¹⁵⁷ The child's mother did not file a medical malpractice claim at the time because of her religious beliefs.¹⁵⁸ When the child was seven months shy of twenty years old, the child filed a medical malpractice claim against the hospital and the physicians who attended her birth, Drs. Robert Hunter and Lawrence Benken.¹⁵⁹

The defendant doctors filed a motion to dismiss based upon the Indiana Medical Malpractice Act's statute of limitations period for minors, which states that claims must be filed before the child's eighth birthday.¹⁶⁰ The trial court granted the motion.¹⁶¹ The court of appeals, however, reversed the trial court's decision and remanded the case to the trial court to consider the constitutionality of the statute of limitations as applied to the plaintiff under the Privileges and Immunities Clause of the Indiana Constitution.¹⁶²

Shortly thereafter, the injured plaintiff died and her mother was substituted as plaintiff in the case.¹⁶³ Nevertheless, on remand, the trial court again dismissed the action, "finding that the plaintiff had failed to demonstrate that the

154. For discussion of proximate cause, statute of limitations, fraudulent concealment, continuing wrong, and loss of consortium, see *Hasan v. Begley*, 836 N.E.2d 303 (Ind. Ct. App. 2005); *Garneau v. Bush*, 838 N.E.2d 1134 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1004 (Ind. 2006); *Palmer v. Gorecki*, 844 N.E.2d 149 (Ind. Ct. App.), *trans. denied*, 680 N.E.2d 597 (Ind. 2006).

155. See *Ellenwine v. Fairley*, 846 N.E.2d 657 (Ind. 2006).

156. *Ledbetter v. Hunter*, 842 N.E.2d 810 (Ind. 2006).

157. *Id.* at 812.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* (citing *Ledbetter v. Hunter*, 652 N.E.2d 543 (Ind. Ct. App. 1995)). This section of the Indiana Constitution can be found at Article I, Section 23, and states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

163. *Id.*

statute was unconstitutional.”¹⁶⁴ The plaintiff’s argument begins by asserting that under the medical malpractice statute of limitations, minors have two years within which to file a claim, or if they were injured within the first six years of life, they have until they are eight to file a claim. However, minors who are victims of other torts have until two years after the age of majority to file a claim.¹⁶⁵

The plaintiff’s argument further states that there are unequally created classes that are “1) those children injured by medical malpractice; and 2) those children injured by negligence other than medical malpractice.”¹⁶⁶ Additionally, the plaintiff argued that two subclasses of minor victims are treated differently: “1) those with parents who seek legal advice and file a claim; and 2) those with parents who chose not to do the same.”¹⁶⁷

The court affirmed the trial court’s dismissal of the case.¹⁶⁸ The court held that plaintiff’s first argument failed because she did not “negate the legislative basis for unequal treatment of the two identified classes”: children injured by medical malpractice and children injured by negligence other than medical malpractice.¹⁶⁹ The court stated, “Demonstrating a lack of substantial evidence supporting a legislative rationale does not affirmatively establish that the rationale is unreasonable.”¹⁷⁰ The court also found the plaintiff’s argument about the subclasses to be lacking.¹⁷¹ The court stated, “The children in each of the plaintiff’s alleged subclasses share the same statute of limitations regime, with different results occurring only based upon whether or not the child, through her parents, elects to comply with the statutory deadlines.”¹⁷²

*Ellenwine v. Fairley*¹⁷³ applied a statute of limitations issue to a medical malpractice case involving a deceased minor. In *Ellenwine*, the Indiana Supreme Court reversed the trial court’s grant of summary judgment in favor of the defendant doctor, Dawn Fairley, D.O. (“Dr. Fairley”) and held that “the MMA [Medical Malpractice Act] and CWDA [Child Wrongful Death Act] operated together to require the Ellenwines to get their claim on file within the first to expire either of the MMA limitations period ([their child’s] eighth birthday) or of the CWDA limitations period (two years from date of death).”¹⁷⁴

The court’s analysis of this case was quite complicated and examined a few possibly applicable statutes of limitations. While pregnant with her son Dustin,

164. *Id.* (citing Appellant’s App. at 28).

165. *Id.* at 813 (citing IND. CODE § 34-11-6-1 (2004)).

166. *Id.* (quoting Brief of Appellant at 10).

167. *Id.* at 813-14 (quoting Brief of Appellant at 11).

168. *Id.* at 815.

169. *Id.* at 814.

170. *Id.*

171. *Id.* at 815.

172. *Id.*

173. 846 N.E.2d 657 (Ind. 2006).

174. *Id.* at 666.

Michelle Ellenwine was treated by Dr. Dawn Fairley (“Dr. Fairley”).¹⁷⁵ Within a few days of birth, physicians informed the Ellenwines that due to oxygen deprivation during delivery, Dustin suffered brain damage and experienced seizures.¹⁷⁶ Dustin later died when he was two years old.¹⁷⁷ After filing a proposed medical malpractice complaint against Dr. Fairley with the Indiana Department of Insurance, which issued a unanimous opinion in favor of the Ellenwines, the Ellenwines filed a claim against Dr. Fairley with the trial court under Indiana’s Child Wrongful Death Act.¹⁷⁸

In reaching its conclusion that the case could not be dismissed on summary judgment grounds based upon a statute of limitations, the court examined Indiana’s Medical Malpractice Act,¹⁷⁹ Survival Statute,¹⁸⁰ and Child Wrongful Death Act, alone and in conjunction with each other. The court summarized its

conclusions with respect to a child patient who is the victim of medical negligence prior to the child’s sixth birthday who dies prior to the child’s eighth birthday. (1) If the death was caused by the malpractice, (a) the malpractice claim (brought by the legal representative of the child) terminates at the child’s death, Ind. Code § 34-9-3-1(a)(6) (2004); and (b) any wrongful death claim must be filed within the first to expire of either the MMA limitations period (the child’s eighth birthday) or the CWDA limitations period (two years from the date of death). (2) If the death was from a cause other than the malpractice, both (a) the malpractice claim (whether brought by the patient or another as the representative of the patient) and (b) any wrongful death claim must be filed within first to expire either of the MMA limitations period (the child’s eighth birthday) or of the CWDA limitations period (two years from date of death).¹⁸¹

B. Contributory Negligence

The Indiana Supreme Court decided a contributory negligence issue in *Cavens v. Zaberdac*.¹⁸² In this case, the primary issue was whether the trial court wrongfully prohibited Dr. Robert Cavens (“Dr. Cavens”), the defendant, from asserting a contributory negligence defense based upon the conduct of Peggy Miller (“Miller”), the patient, which occurred prior to the alleged malpractice of Dr. Cavens.¹⁸³ The supreme court affirmed the trial court’s granting of the

175. *Id.* at 659.

176. *Id.*

177. *Id.*

178. *Id.* Indiana’s Child Wrongful Death Act can be found at Indiana Code section 34-23-2-1.

179. IND. CODE §§ 34-18-1-1 to -18-2 (2004).

180. *Id.* §§ 34-9-3-1 to -5.

181. *Ellenwine*, 846 N.E.2d at 667.

182. 849 N.E.2d 526 (Ind. 2006).

183. *Id.* at 527.

plaintiff's motion for judgment on the evidence as to the issue of contributory negligence.¹⁸⁴

In *Cavens*, Miller, who was represented in this case by her husband, suffered from severe and persistent asthma.¹⁸⁵ She had a regular doctor who had prescribed medication and informed Miller that she should seek emergency medical care in case she had "significant asthma symptoms."¹⁸⁶ On the day of her death, Miller began suffering from symptoms associated with a severe asthma problem at about 7:00 a.m.¹⁸⁷ She took several doses of her medication, called a friend for help, and by about noon, she called for an ambulance to take her to a hospital. In the emergency room, Miller was treated by Dr. Cravens but went into cardiac arrest and died¹⁸⁸ at approximately 11:45 p.m. that same evening.¹⁸⁹

Dr. Cravens presented testimony of physicians who argued that Miller aggravated her condition by improperly taking too much of her medication and that Miller unreasonably delayed seeking medical treatment from a physician.¹⁹⁰ The trial court did not allow Dr. Cravens to present these arguments as his defense of contributory negligence.¹⁹¹ The contributory negligence rule is that, "[a] patient may not recover in a malpractice action where the patient is contributorily negligent by failing to follow the defendant physician's instructions if such contributory negligence is simultaneous with and unites with the fault of the defendant to proximately cause the injury."¹⁹²

Dr. Cravens argued that any doctor treating a patient after that patient was negligent in caring for his/her own condition should not be liable for the patient's injuries or aggravation of injuries, even if the doctor's care is below the applicable standard of care.¹⁹³ The court did not agree and cited to the "staple of tort law that the tortfeasor takes her victim as she finds him."¹⁹⁴ The court stated, "To permit healthcare providers to assert their patients' pre-treatment negligent conduct to support a contributory negligence defense would absolve such providers from tort responsibility in the event of medical negligence and thus operate to undermine substantially such providers' duty of reasonable care."¹⁹⁵

The court eventually found that any alleged negligence on Miller's part "was

184. *Id.* at 534.

185. *Id.* at 528.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *See id.*

192. *Id.* at 529 (citing *Harris v. Cacdac*, 512 N.E.2d 1138, 1139-40 (Ind. Ct. App. 1987)).

193. *Id.* at 529-30.

194. *Id.* at 530 (citing *Bemenderfer v. Williams*, 745 N.E.2d 212, 218 (Ind. 2001)); *see also* *Brokers, Inc. v. White*, 513 N.E.2d 200, 203-05 (Ind. Ct. App. 1987); *Dunkelbarger Constr. Co. v. Watts*, 488 N.E.2d 355, 358 (Ind. Ct. App. 1986); *Johnson v. Bender*, 369 N.E.2d 936, 940 (Ind. App. 1977); RESTATEMENT (SECOND) OF TORTS § 461 (1965).

195. *Cavens*, 849 N.E.2d at 530.

not ‘simultaneous and cooperating’ with the alleged medical negligence of Dr. Cavens.”¹⁹⁶ Additionally, because there was no evidence that Dr. Cavens was Miller’s treating physician at the time that she allegedly took her medication in excess and delayed in seeking medical treatment, the court found that there was “insufficient evidence supporting the issue of contributory negligence” and that the trial court correctly prohibited “Dr. Cavens from asserting the defense of contributory negligence.”¹⁹⁷

C. Sufficiency of Expert Affidavit

In *Mills v. Berrios*,¹⁹⁸ the Indiana Court of Appeals held that the affidavit of Teresa Mills’s (“Mills”) medical expert was sufficient to demonstrate the existence of a genuine issue of material fact regarding whether defendants Dr. Carlos Berrios (“Dr. Berrios”), Methodist Hospital, and OrthoIndy (collectively, “Healthcare Providers”) complied with the appropriate standard of care.¹⁹⁹ The court of appeals therefore reversed the trial court’s entry of summary judgment in favor of the healthcare providers and remanded the case back to the trial court for further proceedings.²⁰⁰

Mills had surgery to remove her right knee cap due to chronic pain. However, she continued to experience pain, and within a week after her release she was admitted to the hospital complaining of an inability to urinate and she had pain in her right leg.²⁰¹ Mills thereafter underwent several surgeries to remove dead tissue on her heel, which was from a pressure ulcer and then underwent wound care and pain control.²⁰²

After the Healthcare Providers filed motions for summary judgment, Mills filed her brief in opposition with designated evidence, which included an affidavit of Mills and an affidavit of her expert, Dr. William Pohnert (“Dr. Pohnert”).²⁰³ The Healthcare Providers moved to strike Mills’s affidavit as it was not executed properly and moved to strike Dr. Pohnert’s affidavit because Mills’s medical records were not attached thereto, or as designated evidence, and Dr. Pohnert’s affidavit was “impermissibly based on Mills’s statements and subjective symptoms.”²⁰⁴ The trial court thereafter struck Mills’s affidavit, struck

196. *Id.* at 531.

197. *Id.* at 532. For an additional case decided during the survey period dealing with contributory negligence, see *Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509 (Ind. Ct. App. 2005), *trans. denied*, 860 N.E.2d 586 (Ind. 2006). In *Carter*, contributory negligence precluded a wrongful death suit against a county, as the deceased person had assumed the risk of jumping street hills. *Id.* at 524.

198. 851 N.E.2d 1066 (Ind. Ct. App. 2006).

199. *Id.* at 1072.

200. *Id.* at 1072-73.

201. *Id.* at 1068.

202. *Id.*

203. *Id.* at 1068-69.

204. *Id.* at 1069.

portions of Dr. Pohnert's affidavit referring to Mills's affidavit, found the remaining portions of Dr. Pohnert's affidavit insufficient to oppose the designated evidence attached to the Healthcare Providers' motions for summary judgment, and entered summary judgment in favor of the Healthcare Providers.²⁰⁵

The court examined the three elements a plaintiff must prove in order to prevail in a medical malpractice case: "(1) a duty on the part of the defendant in relation to the plaintiff; (2) a failure to conform his conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff resulting from that failure."²⁰⁶ Furthermore, when a medical review panel determines that a doctor's care was within the applicable standard of care, the plaintiff must have an expert to negate the panel's decision.²⁰⁷

Mills argued that the remaining portions of Dr. Pohnert's affidavit sufficiently established his credentials as an expert, stated that he reviewed Mills's medical records, and set forth Dr. Pohnert's conclusion that the Healthcare Providers failed to comply with the appropriate standard of care in their treatment of Mills, causing her complained of injury, and was therefore sufficient to raise a genuine issue of material fact preventing summary judgment.²⁰⁸ The court of appeals agreed.²⁰⁹

D. Application of Release

In *Cummins v. McIntosh*,²¹⁰ the Indiana Court of Appeals addressed whether a release as between the patient, Joe Cummins ("Cummins") and the manufacturer of an intramedullary nail, Smith & Nephew, applied to release Cummins's doctor, Brent McIntosh ("Dr. McIntosh") from liability for allegedly breaching the applicable standard of care for allowing McIntosh to return to work and full weight bearing without x-raying his bones to determine whether he had fully healed.²¹¹

The trial court granted summary judgment for Dr. McIntosh, concluding that the release as between Cummins and Smith & Nephew applied to claims against Dr. McIntosh as well.²¹² However, the court of appeals determined that a genuine

205. *Id.* (citing Appellant's App. at 9).

206. *Id.* at 1070 (citing *Oelling v. Rao*, 593 N.E.2d 189, 190 (Ind. 1992)).

207. *Id.* (citing *Bunch v. Tiwari*, 711 N.E.2d 844, 850 (Ind. Ct. App. 1999)).

208. *Id.* at 1071.

209. *Id.* at 1072. The Healthcare Providers also argued that Dr. Pohnert's affidavit was insufficient because Mills's medical records were not designated evidence attached to Mills's response to the Healthcare Providers' summary judgment motions, and were not attached to his affidavit. The court disagreed however, and turned to Indiana Evidence Rules 703 and 705, finding that Dr. Pohnert's affidavit was not legally insufficient just because Mills's medical records were not attached or designated. *Id.* For further discussion of this issue in this case, see Jeff Papa, *Recent Developments in Indiana Evidence Law*, 40 IND. L. REV. 863 (2007).

210. 845 N.E.2d 1097 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

211. *Id.* at 1101.

212. *Id.* at 1102.

issue of material fact remained as to whether this was true. The court of appeals recited the current rule with regard to releases: “[A] valid release of one tortfeasor from liability for harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them.”²¹³ Therefore, the determination depended upon the language of the release.

After a review of the applicable release, the court determined that the language did not go so far as to specifically limit its applicability to Smith & Nephew only, but it also did not specifically include Dr. McIntosh.²¹⁴ Furthermore, Cummins sued Dr. McIntosh at the same time that he sued Smith & Nephew, and the suit against Dr. McIntosh included more allegations than simply the nail breaking, which was the only issue in the suit against Smith & Nephew.²¹⁵ In conclusion, the court found factual questions as to the intent of the parties, and stated, “regardless of how we classify Dr. McIntosh in relation to Smith & Nephew, summary disposition was improper as there are factual issues regarding the scope and effect of the release.”²¹⁶

IV. PREMISES LIABILITY

During the survey period, the Indiana Supreme Court decided one premises liability case, and the Indiana Court of Appeals decided two. All three cases address different issues related to premises liability.

A. Duty to Warn Successor Tenants and the Effect of “As Is” Provisions on Tort Claims

In *Dutchmen Manufacturing, Inc. v. Reynolds*,²¹⁷ the Indiana Supreme Court held that

tort liability of a tenant who leaves a dangerous item on the leased premises at the expiration of a lease is not extinguished by reason of the expiration of the lease. [And], that a provision in a lease to a successor tenant that the item is acquired “as is” does not of itself bar a tort claim asserted by a non-contracting party.²¹⁸

In *Dutchmen*, Chapman Realty, Inc. (“Chapman”) leased a facility to Dutchmen Manufacturing, Inc. (“Dutchmen”) for the purpose of working on recreational vehicle travel trailers and fifth wheels. While a tenant, Dutchmen installed scaffolding attached to the ceiling beams. It did this without the consent or knowledge of Chapman. The lease between these parties stated that Dutchmen was to remove all personal property and trade fixtures before vacating the premises, and anything not removed would become the property of Chapman.

213. *Id.* at 1103 (quoting *Huffman v. Monroe County Cmty. Sch. Corp.*, 588 N.E.2d 1264, 1267 (Ind. 1992) (quoting RESTATEMENT (SECOND) OF TORTS § 885(1) (1977))).

214. *Id.* at 1107.

215. *Id.* at 1107-08.

216. *Id.* at 1108.

217. 849 N.E.2d 516 (Ind. 2006).

218. *Id.* at 518.

The lease also provided that Chapman could require removal of anything left, at Dutchmen's expense.²¹⁹

Initially, near the expiration of Dutchmen's lease, Chapman told Dutchmen to remove the scaffolding or pay for the removal. Chapman also then began negotiations to lease the facility to Keystone RV, Inc. ("Keystone"). Keystone was also a manufacturer of travel trailers, and expressed that it wanted the scaffolding to remain in the facility. Dutchmen offered to sell the scaffolding to Keystone, which offer was refused. Dutchmen then agreed to give the scaffolding to Keystone if Chapman did not charge Dutchmen for its removal.²²⁰

When Dutchmen left the facility, it also left the scaffolding in place. Two weeks afterward, Keystone signed a lease with Chapman that contained an "as is" provision. About seven months after taking possession of the facility, Chad Reynolds ("Reynolds"), a Keystone employee, was injured when he was struck by scaffolding that had broken loose from its mounting. The employee was rendered paralyzed below the neck. The Keystone injury report and Keystone engineers determined that a weld had failed due to lack of lubricant and "improper welding procedure." The weld was not visible as it was concealed by an outer tube and an end cap.²²¹

Reynolds sued both Chapman and Dutchmen. He alleged that Dutchmen was liable for negligence because it constructed and installed defective scaffolding, and that it was liable under Section 388 of the Restatement (Second) of Torts because it supplied a defective chattel. Dutchmen responded that it did not owe Reynolds any duty, it was not negligent per se, the scaffolding was not a chattel, Keystone was aware of the dangers of scaffolding, and Keystone accepted the premises and scaffolding "as is."²²²

The trial court granted summary judgment in favor of Dutchmen on Reynolds's negligence per se claim and all other negligence theories except the Section 388 claim. The court of appeals reversed and remanded, directing the trial court to enter summary judgment for Dutchmen on all theories, including the Section 388 claim.²²³ The court of appeals reversed based upon its holding that Reynolds could not recover on its theory that Dutchmen supplied a defective chattel because the scaffolding merged with the real estate at the expiration of Dutchmen's lease.²²⁴

The only issue on appeal to the supreme court was Reynolds's Section 388 claim. Section 388 provides:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 518-19.

223. *Id.* at 519 (citing *Dutchmen Mfg., Inc. v. Reynolds*, 819 N.E.2d 529, 533 (Ind. Ct. App. 2004)).

224. *Id.* (citing *Dutchmen Mfg., Inc. v. Reynolds*, 831 N.E.2d 750 (Ind. 2005)).

use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.²²⁵

The court found that the parties agree that the scaffolding is a trade fixture, which is defined as “personal property put on the premises by a tenant which can be removed without substantial or permanent damage to the premises.”²²⁶ Therefore, because chattel is “movable or transferable property; personal property[,]”²²⁷ the scaffolding was a chattel at the time Dutchmen occupied the facility.²²⁸

Dutchmen, however, argued that Section 388 is not applicable to the matter because the scaffolding was not a chattel at the time of Reynolds’s accident because it had merged with the reality and title to the scaffolding vested with Chapman after Dutchmen left the facility and before Keystone signed its lease.²²⁹ Reynolds, on the other hand, argued that an agreement to transfer ownership of the scaffolding to Keystone with the consent of Chapman was completed before Dutchmen left the facility.²³⁰

The court agreed that “a trade fixture installed by a tenant merges with the realty and thereby becomes the property of the landlord if it is left on the premises after the tenant leaves the premises[,]” however, there was no mention of the scaffolding in the agreements between Chapman and Keystone, and Chapman “disclaimed ownership of the scaffolding and demanded its removal which, if not done, would be performed at the tenant’s expense.”²³¹

The court was not persuaded by any argument about who owned the scaffolding, however, and found that tort liability under Section 388 fall onto the party who caused the loss.²³² The court therefore held that when drawing factual inferences in favor of the non-movant, as required in a summary judgment analysis, summary judgment could not be affirmed in Dutchmen’s favor because the designated evidence supports “the inference that the intention of all three parties involved was that Keystone would obtain ownership of the scaffolding if

225. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 388 (1977)).

226. *Id.* at 520 (quoting 14 IND. LAW ENCYCLOPEDIA, FIXTURES §14 at 137 (West 2004)).

227. *Id.* at 519 (quoting BLACK’S LAW DICTIONARY 251 (8th ed. 2004)).

228. *Id.* at 520.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 521.

and when it signed its lease with Chapman[,]”²³³ essentially allowing the Dutchmen to leave the scaffolding at the Chapman facility until and if Keystone signed a lease for the Chapman facility. If Keystone and Chapman had not entered into a lease agreement, Dutchmen would have been required to remove the scaffolding or pay for its removal.²³⁴ Therefore, there was no merger between the scaffolding and the facility, and it remained Dutchmen’s chattel until Keystone signed a lease with Chapman, thereby “it was a chattel at the time it was supplied to Keystone and is susceptible to a Section 388 claim.”²³⁵ After a discussion of the elements of a Section 388 claim, the court held that “the evidence viewed in a light most favorable to Reynolds permits the inference that Dutchmen negligently welded the scaffolding, and also failed to conduct a reasonable inspection of the scaffolding and ensure adequate lubricant[,]” sufficiently supporting a denial of Dutchmen’s summary judgment motion.²³⁶

Dutchmen next argued that it is not liable under Section 388 because Keystone accepted the facility and scaffolding “as is” pursuant to its contract with Chapman.²³⁷ The court found that “[t]he implications of such a disclaimer as to third party tort claims are not clearly spelled out and. . . , are not made clear by settled judicial precedent.”²³⁸ The court found little case law on the effects an “as is” clause might have on the liability of third parties and found the cases cited by Dutchmen, in its support, were not applicable to the facts of this case.²³⁹ Therefore, none of Dutchmen’s arguments barred Reynolds’s Section 388 claim.²⁴⁰

B. Invitee Versus Licensee

The second premises liability case during the survey period, decided by the court of appeals, addressed the issue of whether the plaintiff was a licensee or invitee for purposes of determining the duty he was owed and whether the alleged defect was latent. These two issues were considered in *Rhoades v. Heritage Investments, LLC*,²⁴¹ after the trial court granted summary judgment in favor of Heritage Investments, LLC and Timothy E. Moll (“Moll”) (collectively “Heritage”) and against Edward and Jayne Rhoades (“Rhoades”).²⁴²

In this matter, Rhoades accompanied a friend (“Maier”) to a building that had been renovated by Heritage. Rhoades drove himself and Maier to the building and walked into the building with Maier. Moll, who was a friend to Maier, was

233. *Id.* at 522.

234. *Id.* (citing *Merrell v. Garver*, 101 N.E.2d 152, 156 (Ind. App. 1913)).

235. *Id.*

236. *Id.* at 523.

237. *Id.*

238. *Id.*

239. *Id.* at 524-25.

240. *Id.* at 525.

241. 839 N.E.2d 788 (Ind. Ct. App. 2005), *trans. denied*, 860 N.E.2d 584 (Ind. 2006).

242. *Id.* at 790.

waiting inside the building. Rhoades was not invited into the building, and did not participate in the conversations between Moll and Maier. Additionally, Rhoades was not asked to leave the building, believed he had permission to be in the building, and noticed that the building was “big, empty, and dimly lit.”²⁴³

At one point, Rhoades followed Moll and Maier to the second level of the building, but then decided to descend the stairs before Moll and Maier because he was uncomfortable on the second level without guardrails and with poor lighting. When Rhoades reached the landing of the staircase, he believed himself to be at the bottom of the stairs, so he took a step to what he thought was the bottom of the stairs. In fact, Rhoades had not reached the bottom of the stairs, stepped off the landing, and broke his arm and glasses in the fall.²⁴⁴

The trial court dismissed Rhoades’s negligence suit against Heritage on summary judgment because Rhoades was a licensee who entered the property out of curiosity and took the property as he found it, and

Heritage did not willfully or wantonly injure Rhoades or act in a manner to increase his peril and that it did not breach its duty to warn Rhoades of any latent danger on the premises because Rhoades recognized . . . that it was a work area, and he noticed all of the alleged defects before falling.²⁴⁵

On appeal, Rhoades argued that he was either expressly an invitee or Maier’s invitee status should extend to him.²⁴⁶ The court of appeals first rejected his argument that he was an invitee and found the following facts in support of their conclusion: he took no part in the conversations between Moll and Maier (who was invited), he was not asked to leave, he believed he had permission to be there, no one invited him to the second level, and he went to the second level out of curiosity. The court held, “no reasonable person could conclude that Moll extended an invitation to Rhoades to enter the building or to go upstairs. Rather, the evidence most favorable to Rhoades established that Moll merely gave Rhoades permission to enter the building and to go upstairs. This mere permission made Rhoades a licensee.”²⁴⁷

The court of appeals also rejected Rhoades’s argument that he was a invitee based solely upon Maier’s status as an invitee. The court found that the important facts in this issue were that the only purpose Rhoades had at the building was to accompany Maier, Moll did not treat Rhoades as he did Maier, and he was not invited into the building or up the stairs. “Rhoades was properly considered a licensee.”²⁴⁸

243. *Id.*

244. *Id.* at 790-91.

245. *Id.* at 791.

246. *Id.* at 793.

247. *Id.*

248. *Id.* at 794 (citing *Henry H. Cross Co. v. Simmons*, 96 F.2d 482, 486 (8th Cir. 1938) (“One who accompanies an invitee to the premises of another for his own pleasure or for his own purpose is not an invitee.”); *Howard v. The Gram Corp.* 602 S.E.2d 241, 243 (Ga. Ct. App. 2004)).

Having determined that the trial court did not err in its determination that Rhoades was a licensee, the court of appeals then addressed whether the trial court properly found that Heritage did not breach the duty it owed Rhoades as a licensee. “A landowner’s only duties to a licensee are to refrain from willfully and wantonly injuring the licensee and to warn the licensee of any latent danger on the premises of which the owner has knowledge.”²⁴⁹ The court of appeals found that Rhoades did not attempt to show that Heritage renovated the building with the intent to wantonly or willfully injure Rhoades or anyone else. Furthermore, the court found that it did not agree with Rhoades that the staircase was a latent defect. “Latent is defined as concealed or dormant.”²⁵⁰ Rhoades himself admitted that he knew the building was dimly lit and the staircase had no guardrails or handrails. Therefore, the court agreed with the trial court that Heritage did not breach any duty it owed to Rhoades as a licensee.²⁵¹

C. Negligent Misrepresentation

The third and last notable case dealing with premises liability decided during the survey period is *Thomas v. Lewis Engineering, Inc.*²⁵² In this case, the Indiana Court of Appeals affirmed the trial court and held that Lewis Engineering, Inc. (“Lewis Engineering”) did not owe a duty to Deann Thomas (“Thomas”), a landowner with which Lewis Engineering had not contracted.²⁵³

In this case, Thomas sued Lewis Engineering alleging negligent misrepresentation based upon a survey retracement it did for a property owner adjacent to Thomas when that property owner hired Lew Engineering for the purpose of locating a west boundary line so that the adjacent property owner could erect a fence.²⁵⁴ In a subsequent quiet title action, however, judgment was entered in favor of Thomas and against the adjacent property owner.²⁵⁵

Despite Thomas’s allegation that Lewis Engineering negligently misrepresented the boundary line to the adjacent property owner, based upon Restatement (Second) of Torts, section 552, the court found that Indiana has adopted this tort only in the context of an employment relationship.²⁵⁶ The court has held in the past “that a professional owes no duty to one with whom he has no contractual relationship unless the professional has actual knowledge that such third person will rely on his professional opinion.”²⁵⁷

As the rule was applied in this matter, the court found no evidence that Lewis

249. *Id.* (citing *Wright v. Int’l Harvester Co.*, 528 N.E.2d 837, 839 (Ind. Ct. App. 1988)).

250. *Id.* (citing BLACK’S LAW DICTIONARY 898 (8th ed. 2004)).

251. *Id.*

252. 848 N.E.2d 758 (Ind. Ct. App. 2006).

253. *Id.* at 762.

254. *Id.* at 759.

255. *Id.*

256. *Id.* at 760 (citing *Eby v. York-Division, Borg-Warner*, 455 N.E.2d 623 (Ind. Ct. App. 1983); *Tri-Professional Realty, Inc. v. Hillenburg*, 669 N.E.2d 1064, 1068 (Ind. Ct. App. 1996)).

257. *Id.* (citing *Eby*, 455 N.E.2d at 623; *Tri-Professional*, 669 N.E.2d at 1068).

Engineering knew Thomas would rely on Lewis Engineering's survey.²⁵⁸ In fact, Thomas did not rely on the survey.²⁵⁹ Rather, Thomas argued that the survey was inaccurate.²⁶⁰ Therefore, because there was no contractual agreement between Thomas and Lewis Engineering and Lewis Engineering did not know that Thomas would rely on its survey, the court held that Thomas failed to state a claim under Indiana law against Lewis Engineering.²⁶¹

V. INDIANA TORT CLAIMS ACT

During the survey period, the Indiana Supreme Court was asked to answer certified questions from the United States District Court, Northern District of Indiana, in *Cantrell v. Morris*.²⁶² The certified questions, and response, address issues related to the Indiana Tort Claims Act ("ITCA"). The court's response was as follows:

1) we do not resolve whether Article I, Section 9 of the Indiana Constitution imposes any restrictions on government officials in dealing with political activity or affiliation of public employees; 2) to the extent that tort doctrines give a civil damage remedy to a public employee terminated for political activity or affiliation in violation of Article I, Section 9 of the Indiana Constitution, any such wrongful discharge claim is governed by the Indiana Tort Claims Act (ITCA); and 3) the Indiana Constitution does not of itself give rise to any such claim, and does not prevent the ITCA from applying to such a claim.²⁶³

In *Cantrell*, the plaintiff below, John Cantrell, was appointed as a public defender by a judge who did not seek reelection. Cantrell, nevertheless, supported the candidacy of someone who was not elected. Thirty days after Judge Sonya A. Morris ("Morris") was elected and took office, Cantrell was terminated.²⁶⁴ Cantrell then sued Morris alleging that she terminated him for his support of her opponent and asserted that his termination gave rise to a claim under 42 U.S.C. § 1983 and independent claims for violation of his free speech

258. *Id.* at 761.

259. *Id.* at 762.

260. *Id.*

261. *Id.* The court also discussed, and disagreed with, Thomas's argument that Lewis Engineering had a duty to Thomas based upon the three factors discussed in *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991), wherein the Indiana Supreme Court set forth the formula to determine the existence of a duty in an ordinary negligence claim. *Thomas*, 848 N.E.2d at 761. The *Thomas* court held that the *Webb* formula did not apply because Thomas claimed negligent misrepresentation, and even if it were to apply to Thomas's claim, her claim "would still fall short[]" because Thomas did not have any relationship with Lewis Engineering and because public policy analysis would not favor such a broad duty. *Id.*

262. 849 N.E.2d 488 (Ind. 2006).

263. *Id.* at 490.

264. *Id.*

and association rights under both the U.S. and Indiana Constitutions.²⁶⁵ More specifically, Cantrell sought compensatory and punitive damages for violation of his free speech rights under Indiana Constitution Article I, Section 9. Cantrell also sought reinstatement of his employment.²⁶⁶ After denying Morris's motion to dismiss Cantrell's claim, the district court certified questions to the Indiana Supreme Court.

The court summarized its conclusions as follows:

[W]e expressly decline to address whether termination of a public employee may give rise to a violation of the Indiana Constitution. If a violation of Section 9 can supply the invasion of a right necessary for a wrongful discharge claim, the civil damages remedy against the government for a wrongful discharge is limited by the ITCA, and the individual official is entitled to immunity and indemnity to the extent provided by the ITCA.²⁶⁷

Just one week before the court's opinion in *Cantrell*, the Indiana Supreme Court handed down decisions in *Patrick v. Miresso*²⁶⁸ and *City of Indianapolis v. Garman*.²⁶⁹ In both cases the court held that governmental immunity under the ITCA does not act to immunize police officers and cities from liability when an officer allegedly operates his vehicle negligently while attempting to enforce laws.²⁷⁰ Additionally, the trial courts in both cases denied the defendants' motions for summary judgment based upon governmental immunity in the ITCA, and the defendants appealed.²⁷¹

The defendants argued that because the officers were engaged in law enforcement at the time of the accidents, the officers and the cities were immune from liability pursuant to the ITCA, which provides that a government entity or employee that is acting within the scope of his employment is not liable for loss resulting from the enforcement of a law.²⁷² However, as the trial courts noted, Indiana Code section 9-21-1-8 requires also that emergency vehicles be operated with "due regard for the safety of all persons."²⁷³ Therefore, the ITCA was found to not grant immunity to government agencies or employees that breach their duty of reasonable care, outlined in Indiana Code section 9-21-1-8.²⁷⁴ Furthermore, whether the officers breached the statutory duty of care was a

265. *Id.*

266. *Id.* at 490-91.

267. *Id.* at 507.

268. 848 N.E.2d 1083 (Ind. 2006).

269. 848 N.E.2d 1087 (Ind. 2006).

270. *Patrick*, 848 N.E.2d at 1086; *Garman*, 848 N.E.2d at 1088.

271. *Patrick*, 848 N.E.2d at 1084; *Garman*, 848 N.E.2d at 1088. This Article will only reference and cite to the *Patrick* case because in *Garman* the court basically recited the facts briefly and then restated its holding in *Patrick*. The court's analysis is contained in the *Patrick* opinion.

272. *Patrick*, 848 N.E.2d at 1084 (quoting IND. CODE §34-13-3-3 (2004)).

273. *Id.* (quoting Appellant's App. at 8).

274. *Id.* at 1085.

genuine issue of material fact precluding summary judgment.²⁷⁵

During the survey period, the Indiana Court of Appeals also handed down a few decisions involving the ITCA. In *Orndorff v. New Albany Housing Authority*,²⁷⁶ the court of appeals found that the New Albany Housing Authority (“NAHA”) is a municipal corporation, and thereby a political subdivision that is subject to the notice provisions of the ITCA. The court further concluded that plaintiff, Victor Orndorff (“Orndorff”), did not comply with the notice provisions, and the trial court properly granted the NAHA’s motion to dismiss.²⁷⁷

In this case, Orndorff was a resident of the NAHA in Floyd County. While on NAHA’s property, Orndorff was shot by a non-resident. While the police were investigating the incident that same evening, NAHA employees were assisting the police and present at the property, but did not conduct its own independent investigation.²⁷⁸ After Orndorff filed a complaint against the NAHA, the NAHA filed a motion to dismiss arguing that Orndorff did not comply with the notice requirements of the ITCA.

After a review of a few statutes defining political subdivisions and municipal corporations²⁷⁹ and the manner by which the NAHA was created, the court of appeals held that the NAHA is a municipal corporation, which is a political subdivision subject to the notice provisions of the ITCA.²⁸⁰ Lastly, the court found that even though in some instances Indiana courts have allowed substantial compliance with the ITCA notice requirements,²⁸¹ there was no substantial compliance in this case where Orndorff sent no notice to the NAHA but relied solely on the NAHA’s presence at the scene the night of the shooting for his argument of substantial compliance with the notice provisions.²⁸²

In *Oshinski v. Northern Indiana Commuter Transportation District*,²⁸³ the Indiana Court of Appeals decided a case under the ITCA in which the plaintiff sued under the Federal Employer’s Liability Act (“FELA”). Thomas Oshinski sued his then employer, the Northern Indiana Commuter Transportation District (“NICTD”) for allegedly negligently failing to provide him with proper safety equipment.²⁸⁴ The trial court granted the NICTD’s motion for summary judgment based upon NICTD’s sovereign immunity and ITCA affirmative defenses.²⁸⁵ On appeal, Oshinski argued that he was not required to comply with

275. *Id.*

276. 843 N.E.2d 592 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 584 (Ind. 2006).

277. *Id.* at 596-97.

278. *Id.* at 593.

279. *Id.* at 594-95 (citing IND. CODE §§ 34-13-3-22 (2004), 34-6-2-110 (2004), 36-1-2-10 (2006)).

280. *Id.* at 595-96.

281. *Id.* at 596 (citing *Howard County Bd. of Comm’rs v. Lukowiak*, 810 N.E.2d 379, 382 (Ind. Ct. App.), *clarified on reh’g*, 813 N.E.2d 391 (Ind. Ct. App. 2004)).

282. *Id.*

283. 843 N.E.2d 536 (Ind. Ct. App. 2006).

284. *Id.* at 537-38.

285. *Id.* at 538.

the ITCA notice requirements because under the facts of this case, “Indiana has given its ‘blanket consent’ to be sued.”²⁸⁶

The court of appeals found that the “ITCA operates as an unequivocal statement of Indiana’s consent to be sued in tort provided certain qualifications—including notice—are fulfilled.”²⁸⁷ The court then concluded that Indiana’s qualified consent to tort suits under the ITCA is properly extended to FELA claims because FELA claims are tort claims.²⁸⁸ Therefore, FELA claims against the State of Indiana “remain available to workers who comply with ITCA’s qualifications.”²⁸⁹

In another ITCA case, *Beck v. City of Evansville*,²⁹⁰ the Indiana Court of Appeals affirmed the trial court’s grant of summary judgment in favor of the City of Evansville (“City”) on the plaintiffs’ (“homeowners”) claims of negligence and nuisance because the City was immune from liability pursuant to the ITCA.²⁹¹ Specifically, the homeowners alleged that the City negligently failed to control flooding in their neighborhood, which allegedly resulted in loss of use of the homeowners’ residences.²⁹²

The ITCA provision applicable in this case provides in part that a government entity is not liable for loss resulting from the performance of discretionary functions.²⁹³ The City argued on appeal that any acts performed in this case were discretionary and therefore immune from liability.²⁹⁴ The court found that whether an act is discretionary is a question of law for the court to decide and “[t]he essential inquiry is whether the challenged act is the type of function that the legislature intended to protect with immunity.”²⁹⁵

The court then reviewed the facts of the case and determined that the City was performing discretionary acts when it commissioned a Stormwater Master Plan, and therefore, the trial court properly granted summary judgment on the homeowners’ negligence and nuisance claims in favor of the City based upon governmental immunity.²⁹⁶ Furthermore, the court noted that “[n]otwithstanding governmental immunity, . . . the homeowners failed to present any evidence to support their allegation that the City negligently operated and maintained the sewer system.”²⁹⁷

286. *Id.* at 539.

287. *Id.* at 544 (citing *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002)).

288. *Id.*

289. *Id.* at 545.

290. 842 N.E.2d 856 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

291. *Id.* at 857-58.

292. *Id.* at 859.

293. *Id.* at 861 (quoting IND. CODE § 34-13-3-3 (2004)).

294. *Id.*

295. *Id.* at 861-62 (citing *Peavler v. Monroe County Bd. of Comm’rs*, 528 N.E.2d 40, 46 (Ind. 1988)).

296. *Id.* at 863.

297. *Id.*

VI. WORKER'S COMPENSATION

In the survey period, the Indiana Supreme Court addressed the issue of whether an employee may continue to pursue a worker's compensation claim after reaching a settlement for damages with a co-employee. Additionally, the Indiana Court of Appeals decided one case of note, regarding the application of the statute of limitations as applied to medical services.

A. Pursuit of a Claim After Settlement

In *DePuy, Inc. v. Farmer*,²⁹⁸ the Indiana Supreme Court was faced with the issue of whether an employee who had already settled a claim for intentional injury against another employee could continue to pursue a worker's compensation claim against his employer. In this case, Anthony Farmer ("Farmer") began to clock out at the end of his work shift when he brushed against another employee, Wynn Swindel ("Swindel"), at their place of employment, DePuy Manufacturing, Inc. ("DePuy").²⁹⁹ Swindel pinned Farmer against a machine and bent Farmer over backward, causing severe injuries to Farmer's back, which resulted in lost work, surgery, and medical bills.³⁰⁰

Farmer thereafter requested worker's compensation benefits for medical expenses, temporary total disability, and permanent disability. He also filed suit against Swindel for battery and DePuy for negligence.³⁰¹ The negligence claim against DePuy was dismissed as barred by the Worker's Compensation Act ("WCA"). Swindel settled the suit against him with a \$3,000 payment to Farmer. In the meantime, DePuy filed a motion to dismiss the worker's compensation claim and, after Farmer settled with Swindel, a renewed motion to dismiss based upon the settlement between Farmer and Swindel.

The Worker's Compensation Board found that the worker's compensation claim could continue, but directed Farmer to remit the \$3000 settlement to DePuy as a condition to maintaining the worker's compensation claim.³⁰² The court of appeals agreed that the settlement between Farmer and Swindel did not bar the worker's compensation claim against DePuy, but also held that "Farmer's injuries 'although sustained in the course of his employment, [did] not arise out of his employment with DePuy.'"³⁰³

On transfer, the Indiana Supreme Court found that Farmer's injuries were sustained when he was at work and while clocking out at the end of his shift, which was "clearly 'in the course of' his employment."³⁰⁴ The court also found that Farmer was not participating in horseplay, which would mean Farmer would

298. 847 N.E.2d 160 (Ind. 2006).

299. *Id.* at 163.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* (quoting *DePuy, Inc. v. Farmer*, 815 N.E.2d 558, 565 (Ind. Ct. App. 2004)).

304. *Id.* at 164 (citing *Global Constr., Inc. v. March*, 813 N.E.2d 1163, 1166 (Ind. 2004); *Bertoch v. NBD Corp.*, 813 N.E.2d 1159, 1161 (Ind. 2004)).

not be entitled to worker's compensation benefits, and that Swindel lost control and proceeded with an unprovoked attack on Farmer.³⁰⁵ Furthermore, the court found that "because the incident was the product of no fault on the part of either Farmer or his employer, it occurred 'by accident' as far as DePuy is concerned."³⁰⁶

The principal issue in this case "is the extent to which the rules developed under the specific language of section 13 [of the WCA] as to third part torts also apply to intentional torts by fellow employees."³⁰⁷ To begin, the court agreed with the court of appeals and the Board that section 13 did not bar Farmer's worker's compensation claim against DePuy because section 13 does not apply to Farmer's suit against Swindel.³⁰⁸

The court then addressed the issue of Farmer possibly receiving double recovery by being able to maintain his worker's compensation claim despite already settling with Swindel. The court found that because the Board required Farmer to remit his \$3000 settlement sum to DePuy as a condition to continuing his worker's compensation claim, the goal to avoid double recovery had been met.³⁰⁹ Furthermore, the court agreed with the application of common law subrogation rights to achieve this goal.³¹⁰

B. Statute of Limitations

In *Colburn v. Kessler's Team Sports*,³¹¹ the Indiana Court of Appeals held that the statute of limitations under the Worker's Compensation Act ("WCA"), which requires worker's compensation claims be filed within two years of a work related injury,³¹² applies to claims for medical services, thereby affirming the Worker's Compensation Board's dismissal of Bill Colburn's ("Colburn") Application for Adjustment of Claim ("Claim").³¹³

In this case, Colburn was injured on August 12, 2002 and filed an application for adjustment of claim against Kessler on December 13, 2004, more than two years from the date of his injury. His arguments against the dismissal of his application were that the worker's compensation statute of limitations does not

305. *Id.* at 165.

306. *Id.*

307. *Id.* at 169.

308. *Id.* at 166, 169. Section 13 of the WCA includes a provision that explicitly or by judicial construction allow an employee to sue a third party. "Third party" is defined in this section as someone who is not the employer or a fellow employee. IND. CODE § 22-3-2-13 (2004). Therefore, by definition, section 13 does not apply to the civil suit between Farmer and Swindel.

309. *DePuy*, 847 N.E.2d at 169.

310. *Id.* at 170. The court lastly increased the award per statute by ten percent (10%) because it had been over a decade since Farmer was injured and he had not yet received any worker's compensation benefits. *Id.* at 172.

311. 850 N.E.2d 1001 (Ind. Ct. App. 2006).

312. IND. CODE § 22-3-3-3 (2004).

313. *Colburn*, 850 N.E.2d at 1003.

apply to claims for medical services and the limitations period tolled because there was no “qualifying disagreement” during the two years after his injury.³¹⁴

The court of appeals first found that “because an adjudication of permanent impairment must be made within the two-year statute of limitations under Indiana Code section 22-3-3-3, an employer’s obligation to pay medical expenses does not extend beyond two years from the accident date absent an agreement or Board decision otherwise.”³¹⁵ Because there was no temporary total disability or adjudication of permanent impairment within two years from the date of Colburn’s injury, Kessler was not obligated to pay for Colburn’s medical services after August 12, 2004.³¹⁶

The court then disagreed with Colburn’s argument that Kessler had a duty to get a permanent partial impairment (“PPI”) determination with two years from the date of Colburn’s injury.³¹⁷ Although the court found that employer’s must pay for a PPI assessment as part of an employee’s medical treatment, it also found that Colburn did not show any reason why he did not resolve or preserve his claim prior to the end of the two year period, despite Colburn’s doctors recommending surgery shortly after suffering his injury.³¹⁸ Lastly, the court held that the Board’s dismissal of Colburn’s application for adjustment of claim did not violate public policy.³¹⁹

VII. DEFAMATION AND TORTIOUS INTERFERENCE

A. *Defamation and Tortious Interference with Employment*

In *Trail v. Boys and Girls Clubs of Northwest Indiana*,³²⁰ the Indiana Supreme Court was faced with issues surrounding claims for defamation and tortious interference with an employment at will relationship by Eddie Trail (“Trail”) against his former employer, its board members and executive committee. Trail alleged that the executive committee “contrived a study of the Club . . . to discredit Trail and justify his termination.”³²¹ He also alleged that this report was biased and “cast him in a negative light.”³²² The defendants moved to dismiss the complaint for failure to state a claim under Indiana Rule of Procedure 12(B)(6), which was granted by the trial court. The court of appeals thereafter reversed the trial court’s dismissal of Trail’s claim for tortious interference against the Executive Committee and Trail’s defamation claims. The Indiana Supreme Court granted transfer and affirmed the trial court’s

314. *Id.* at 1005.

315. *Id.* at 1006.

316. *Id.*

317. *Id.* at 1007.

318. *Id.* at 1007-08.

319. *Id.*

320. 845 N.E.2d 130 (Ind. 2006).

321. *Id.* at 133. Trail also alleged breach of contract. *Id.*

322. *Id.* at 133-34.

dismissal of the defamation and interference claims.³²³

The court found that to establish a claim for defamation, “a plaintiff must prove the existence of ‘a communications with defamatory imputation, malice, publication, and damages.’”³²⁴ The defamatory statement must also be false.³²⁵ The two allegedly defamatory communications were the transmission of the report by the individual defendants to other directors or officers of the Club and those discussions as between the individual defendants and other clubs to whom Trail applied for employment.³²⁶

The court quickly determined that the first alleged defamatory communication was privileged as between the persons making the communication because they were made “to a person having a corresponding interest or duty.”³²⁷ Furthermore, Trail inadequately alleged bad faith on the part of the individual defendants, which if Trail had proven bad faith, could have overcome the privilege defense.³²⁸

As to the second alleged defamatory communication, Trail specifically alleged that “defendants have refused to say anything about the report” to the other clubs to which he applied for employment.³²⁹ He continued that this lack of saying anything leads other clubs to assume Trail was dismissed for “commit[ing] grave personal improprieties with the children they serve or financial misdeeds such as embezzlement.”³³⁰ The court found that “the allegation merely refers to the speculative effect the defendants’ non-actionable silence had on Trail’s reputation. It would be an odd use of the defamation doctrine to hold that silence constitutes actionable speech.”³³¹

As to Trail’s claim of tortious interference with his employment, the court found that Trail “must not only allege the basic elements of tortious interference and those special elements related to employees at will, he must also allege some interfering act by officers or directors that rests outside their authority as agents of the corporation.”³³² Trail alleged that the investigation and evaluation by the directors, as well as the power to terminate him, were outside the scope of their authority and that the directors’ actions were based upon ill will, rather than anything corporate in nature.³³³ Nevertheless, the court found that basic corporate agency law supports giving directors a wide range of powers,³³⁴ the

323. *Id.* at 134.

324. *Id.* at 136 (quoting *Davidson v. Perron*, 716 N.E.2d 29, 37 (Ind. Ct. App. 1999)).

325. *Id.* (citing *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 687 (Ind. 1997)).

326. *Id.* at 136-37.

327. *Id.* at 136 (quoting *Bals v. Verduzco*, 600 N.E.2d 1353, 1356 (Ind. 1992) (citations omitted)).

328. *Id.*

329. *Id.* at 137.

330. *Id.*

331. *Id.*

332. *Id.* at 139.

333. *Id.*

334. *Id.* (citing *Ind. Dep’t of Pub. Welfare v. Chair Lance Serv., Inc.*, 523 N.E.2d 1373, 1377

corporation's by laws and articles of incorporation supported their ability to terminate Trail,³³⁵ and that "motives could not affect whether [their] actions were within the scope of [their] duties."³³⁶

B. Defamation Claim Against Newspaper

In *Shepard v. Schurz Communications, Inc.*,³³⁷ the Indiana Court of Appeals was presented with issues related to claims of defamation by an attorney, Clifford Shepard ("Shepard") against Steven Litz ("Litz"), the Monrovia town attorney, and Schurz Communications, Inc. d/b/a Mooresville/Decatur Times ("the Times"), a newspaper. Shepard obtained a list of sewer customers who were allegedly delinquent in paying their sewer bills from Litz. Shepard then sent a letter to each of the persons on the list stating that Litz revealed their names to him. The Times thereafter wrote an article including language from Shepard's letter to the sewer customers, and Litz's response that "Cliff Shepard is a liar. His statement is false."³³⁸

The trial court granted a motion to dismiss filed by the Times, denied Litz's motion to dismiss, and denied a motion for summary judgment by Shepard. At a subsequent hearing, the trial court also awarded the Times attorney fees and costs.³³⁹ The court of appeals addressed the appeal by Shepard of the trial court's dismissal of claims against the Times.

The trial court's dismissal of Shepard's claim of defamation against the Times was based in part upon the anti-SLAPP statute found at Indiana Code section 34-7-7-1, which, in general, protects a person's right to free speech about public issues or issues of public interest, defines "acts in furtherance," sets forth conditions when the rights can be invoked as a defense, and sets forth the procedures for filing a motion to dismiss based upon the statute. The court found at the outset that "it is uncontroverted that a matter of public interest is implicated here."³⁴⁰ And found that "Indiana Code Section 34-7-7-9 does not supplant the Indiana common law of defamation, but provides that the movant must establish that his or her speech was 'lawful.'"³⁴¹

The court found that "[a]ctual malice exists when the defendant publishes a defamatory statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'"³⁴² Furthermore, any statement actionable for

(Ind. 1988)).

335. *Id.* at 140.

336. *Id.* (quoting *Leslie v. St. Vincent New Hope, Inc.*, 873 F. Supp. 1250, 1257 (S.D. Ind. 1995)).

337. 847 N.E.2d 219 (Ind. Ct. App. 2006).

338. *Id.* at 222.

339. *Id.* at 222-23.

340. *Id.* at 224.

341. *Id.* (citing IND. CODE § 34-7-7-9(d) (2004)).

342. *Id.* at 225 (citing *Journal-Gazette Co. v. Bandido's, Inc.* 712 N.E.2d 446, 456 (Ind. 1999)).

defamation must be false in addition to defamatory.³⁴³ Lastly, the complaint must include the alleged defamatory statement.³⁴⁴

In this case, the problem for Shepard, as against the Times, was that in his complaint Shepard did not identify a statement in the article written by the Times that was false and defamatory. Rather, he attached the entire article to his complaint. The only statements treated by Shepard as false were those of Litz, as quoted in the Times article.³⁴⁵ In conclusion, the court found that the Times adequately proved that “it acted without malice and merely reported statements that were essentially rhetorical hyperbole by an opposing attorney, statements incapable of being proved true or false by the Times.”³⁴⁶ Therefore, the court held that the Times was entitled to summary judgment as against Shepard.³⁴⁷

C. Tortious Interference with Business Relationship

In the survey period, the court of appeals decided a case involving a claim for tortious interference with a business relationship in *Geiger & Peters, Inc. v. Berghoff*.³⁴⁸ In this matter, Geiger & Peters, Inc. (“G&P”) and Carl L. Peters (“Peters”) appealed the trial court’s grant of summary judgment for third-party defendants Michael R. Berghoff (“Berghoff”) and Lenex Steel Company (“Lenex Steel”).

Peters was part owner of G&P and also a shareholder of Ferguson Steel Company, Inc. (“FSC”). G&P and FSC were competitors in the steel fabricating business.³⁴⁹ In March 2002, Peters and the other owner of FSC appointed Berghoff as the President of FSC. Thereafter, in November 2002, Berghoff became a part owner and officer of Lenex Steel, which is also in the steel fabricating business.³⁵⁰ Prior to December 2002, Marvin E. Ferguson (“Ferguson”), who served as a director of FSC and was also an officer and owner of Marvin E. Ferguson, Inc. (“MEFI”), entered into a consulting agreement with FSC to, among other things, maintain FSC’s then existing business relationship with Duke Construction Company and Duke/Weeks companies (“Duke”) and develop future work for FSC with Duke.³⁵¹

FSC began having money problems and eventually defaulted on its line of credit. Thereafter, in January 2003, the bank began the liquidation process of

343. *Id.* (citing *Trail v. Boys and Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 136 (Ind. 2006)).

344. *Id.* (citing *Trail*, 845 N.E.2d at 136).

345. *Id.*

346. *Id.* at 226.

347. *Id.* The court also determined that pursuant to the anti-SLAPP statute, the Times was entitled to an award of attorneys’ fees, that the trial court did not abuse its discretion with regard to the award of attorneys’ fees, and that the Times was also entitled to appellate attorneys’ fees. *Id.* at 226-27.

348. 854 N.E.2d 842 (Ind. Ct. App. 2006).

349. *Id.* at 844.

350. *Id.*

351. *Id.*

FSC. FSC blames its default and liquidation on the fact that Duke, who “accounted for well in excess of 50% of the FSC business at all relevant times[,]”³⁵² began withdrawing work from FSC in fall 2002. Then in 2003, Lenex successfully bid on two projects from Duke, which later became Lenex’s largest customer.³⁵³

After the bank filed suit against G&P as the guarantor on the FSC line of credit, G&P filed a third party complaint against Berghoff, Lenex, Ferguson, and MEFL. Its third party claims included one for tortious interference with FSC’s contracts and business relationships with Duke.³⁵⁴ G&P also assigned all of its rights and privileges to Peters with regard to the bank guaranty. Therefore, the analysis of the case began using Peters in place of G&P.³⁵⁵ Peters’s tortious interference claim was based upon his allegation that Berghoff and Lenex solicited work from Duke.³⁵⁶

The court listed the elements of tortious interference with a business relationship as: “(1) the existence of a valid relationship; (2) the defendant’s knowledge of the existence of the relationship; (3) the defendant’s intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from the defendant’s wrongful interference with the relationship.”³⁵⁷ The tort also requires an “independent illegal action.”³⁵⁸

The court then found that even assuming Berghoff and Lenex diverted Duke business from FSC to Lenex, there was no designated evidence demonstrating that Berghoff and Lenex did anything illegal and Peters never argued that Berghoff and Lenex did anything illegal.³⁵⁹ Rather, Peters argued that Berghoff depleted FSC cash flow, tried to get ownership in FSC at a discount, and “diverted work from FSC to Lenex.”³⁶⁰ Therefore, the court held that the trial court properly granted summary judgment to Berghoff and Lenex on Peters’s claim for intentional interference with business relationship.³⁶¹

VIII. PUNITIVE DAMAGES

As an issue of first impression, in *Crabtree ex el. Kemp v. Estate of Crabtree*,³⁶² the Indiana Supreme Court held that “Indiana law does not permit

352. *Id.* at 845.

353. *Id.* at 846.

354. *Id.* at 847.

355. *Id.* at 846.

356. *Id.* at 852-53.

357. *Id.* at 853 (quoting *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 598 n.21 (Ind. 2001)).

358. *Id.* (quoting *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003); *Watson Rural Water Co. v. Ind. Cities Water Corp.*, 540 N.E.2d 131, 139 (Ind. Ct. App. 1989)).

359. *Berghoff*, 854 N.E.2d at 853.

360. *Id.*

361. *Id.*

362. 837 N.E.2d 135 (Ind. 2005).

recovery of punitive damages from a decedent's estate."³⁶³ In this case, the plaintiffs, who were children of the decedent (their father), were passengers in the decedent's car at the time that he had a car accident while intoxicated. After the decedent died of causes unrelated to the car accident, the children sued his estate for compensatory and punitive damages.³⁶⁴

The trial court in this case granted the estate's motion to dismiss the punitive damages claim, and the compensatory damages claim was tried by a jury with a positive result for the children.³⁶⁵ The trial court thereafter reduced the award by the amount that an insurance company had already paid to the children's medical service providers. The children appealed both the dismissal of the punitive damages claim and the reduction in their award.³⁶⁶ The discussion of this case will only address the punitive damages issue.

On the appeal of the dismissal of the punitive damages claim, the court of appeals reversed and held that the punitive damages claim survived the father's death. The plaintiffs argued to the supreme court that section 1 of Indiana's Survival Statute³⁶⁷ overrules the common law rule that claims are gone with the death of a defendant, and therefore, their claim of punitive damages should not have been dismissed.³⁶⁸ The statute provides in part, "if 'an individual who is . . . liable in a cause of action dies, the cause of action survives'"³⁶⁹ The supreme court, however, points out that the statute "does not address the issue of punitive damages one way or the other. It contains no explicit mention of punitive damages. This itself can be viewed as an implicit rejection of punitive damages, which ordinarily are recoverable under a statutory cause of action only by explicit statutory authorization."³⁷⁰

Then on the silence of the Survival Statute on the issue of punitive damages, the supreme court considered interpretation and precedent in its decision. After review of the split of authority in other jurisdictions, the supreme court concluded that it was more persuaded by the majority view, that recovery for punitive damages from the estate of a deceased tortfeasor is not permitted.³⁷¹ The court explained that the purpose of punitive damages is to punish the wrongdoer and deter future tortious conduct, not to reward and compensate plaintiffs.³⁷² Furthermore, the court found that "[t]he effect of a punitive damages award against an estate is that the punishment will ultimately be borne by the heirs who are presumably wholly innocent of any wrongdoing."³⁷³

363. *Id.* at 136.

364. *Id.*

365. *Id.* at 137.

366. *Id.*

367. IND. CODE § 34-9-3-1 (2004).

368. *Crabtree*, 837 N.E.2d at 137.

369. *Id.* at 137 (quoting IND. CODE § 34-9-3-1(a) (2004)).

370. *Id.* (citing *Ind. Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 638 (Ind. 1999)).

371. *Id.* at 138-39.

372. *Id.* at 139.

373. *Id.*

A second case decided in the review period, albeit by the Indiana Court of Appeals, also dealt with an issue related to punitive damages: *Williams v. Younginer*.³⁷⁴ In this case, the court of appeals was faced partially with a question of whether it was wrong for the trial court to decide the issue of punitive damages as a matter of law or whether it should have left the question to be answered by the jury.

The facts of this case are centered on a home purchase and leaking basement walls. The issues in the case before the trial court and jury were related to warranties, breaches of warranties, constructive fraud, breach of contract, and negligence.³⁷⁵ Prior to trial, the parties agreed to bifurcate the issues of punitive damages and attorneys' fees.³⁷⁶ After the jury returned a verdict in favor of the Younginers with damages found to be \$62,305.77, the trial court, upon motion by the defendants, granted judgment on the evidence as to the punitive damages claim.

The law on the issue of punitive damages, as recited by the court of appeals, is that a punitive damages question is usually a question of fact for the fact finder to decide, but may be decided as a matter of law.³⁷⁷ And, just because a tort has been committed, there is not necessarily a right to punitive damages.³⁷⁸ "Punitive damages may be awarded only if there is clear and convincing evidence that defendant 'acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing.'"³⁷⁹

The court of appeals found that after the four day trial concluded, the trial court did "not believe that the evidence is adequate or close to being adequate to prove by clear and convincing evidence the elements and the evidence that the [Younginers] would have to prove to justify an award of punitive damages in this matter."³⁸⁰ The court of appeals also found that on appeal the Younginers attempted to "equate constructive fraud with the conduct required to support a claim for punitive damages[.]"³⁸¹ without directing the court of appeals to any evidence indicating "malice, fraud, gross negligence, or oppressiveness."³⁸² Therefore, on this issue, the court of appeals held that it was not error for the trial court to remove the question of punitive damages from the jury and decide it as a matter of law.³⁸³

374. 851 N.E.2d 351 (Ind. Ct. App. 2006).

375. *Id.* at 355.

376. *Id.*

377. *Id.* at 358 (quoting *Reed v. Cent. Soya Co.*, 621 N.E.2d 1069, 1076 (Ind. 1993)).

378. *Id.* (citing *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 520 (Ind. 1993)).

379. *Id.* (quoting *Erie Ins.*, 622 N.E.2d at 520).

380. *Id.* at 358-59.

381. *Id.* at 359.

382. *Id.* (quoting *Erie Ins.*, 622 N.E.2d at 520).

383. *Id.*

